No. 3543

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

J. A. CZIZEK,

Plaintiff in Error.

VS.

WESTERN UNION TELEGRAPH COMPANY, a Corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the United States District Court for the District of Idaho, Southern Division

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TOPICAL INDEX

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STATEMENT OF THE CASE

This action was brought in the District Court of Ada County, Idaho, to recover Four Thousand Five Hundred ($4,500.00) Dollars damages alleged to have resulted from defendant's failure to deliver a telegram. It was thereupon removed to the United States District Court for the District of Idaho, on the ground that plaintiff was a citizen of Idaho and defendant a New York corporation. Plaintiff in error moved to remand, alleging that he was a citizen

of the State of California, and after a hearing the District Court, on October 10th, 1919, denied the motion to remand (Tr. pp. 54-55). The order provided that plaintiff be allowed an exception to the ruling, but no bill of exceptions covering such ruling was prepared or settled during that term of Court, nor any order sought or obtained extending the time. The succeeding term of the Federal Court began on February 9th, 1920, and during such term the case came on for trial without a jury, pursuant to a written stipulation of the parties (Tr. p. 55). On April 28th, 1920, the Court rendered a decision (Tr. pp. 34-43), and on May 8, 1920, judgment was entered in favor of defendant in error reciting that the Court being fully advised in the premises "finds, concludes and decides in favor of the defendant" (Tr. p. 43).

Notice of the entry of the decision and judgment and a copy of the same was served on counsel for plaintiff in error on May 8th, 1920. Under Rule 76 of the Idaho District (Tr. pp. 120-122), the time for preparing a bill of exceptions to the ruling on the motion to remand expired October 20th, 1919, and the term at which such ruling was made expired at least on February 7, 1920, while the time for preparing a bill of exceptions covering the trial and decision expired May 18, 1920. Plaintiff's motion for new trial, made in accordance with Rule 75 of the Idaho District (Tr. p. 112), and filed on June 5, 1920, came on for hearing on June 17, 1920, "and thereupon for the first time counsel for the plaintiff moved the Court for an extension of time of twenty

days, or until July 8, 1920, within which to serve and file plaintiff's bill of exceptions" (Tr. p. 116). The bill of exceptions recites (Tr. p. 116) that the Court considered the fact of the pendency of the motion for new trial and allowed the plaintiff's motion for an extension of twenty days in which to file his bill of exceptions, at the same time denying the motion for new trial (Tr. p. 117). The proposed bill of exceptions was served and filed on July 2, 1920 (Tr. p. 117) and on July 12, 1920, defendant in error served and filed a motion to strike such proposed bill of exceptions (Tr. pp. 117-120). This motion to strike was sustained "to the extent of striking that portion of the bill of exceptions relating to the motion to remand, on the ground that a bill of exceptions was not prepared and served within the ten days allowed by the rules after the order denying the motion was made, or during the term of Court at which the order denying the motion to remand was made" (Tr. p. 120), and an exception was allowed to such ruling. After certain amendments and corrections had been made, the bill of exceptions was thereupon settled and allowed, and as appears from the transcript it still contained the portion ordered stricken by the Court.

There are no special findings in the record, and no request was made for special findings, and the only finding is the general finding in defendant's favor contained in the judgment which we have quoted above. Under the rule of practice established in this Court and the other Federal Appellate Courts,

we do not think the question of the sufficiency of the evidence is before the Court in the absence of any special findings. And we will, therefore, outline the facts briefly in order that the questions of law raised by rulings at the trial may be considered. The complaint sets forth a telegram written on one of the company's blanks, delivered by one T. J. Jones to defendant's local office in Boise, Idaho, addressed to plaintiff at Oakland, California, readings as follows:

"J. A. CZIZEK,

"5767 Shafter Avenue,

"Oakland, Calif.

"Miller advises Idaho National sold to Pacific offers me ninety dollars per share, otherwise wait year and chances of liquidation says if fails to get two-thirds stock liquidation will follow Will you take ninety dollars per share for yours? I am inclined to accept offer for mine. Answer. "T. J. JONES."

(Tr. p. 9.)

It is alleged that this telegram was never transmitted and never received by plaintiff; that at the time the said Miller was ready, willing and able to buy plaintiff's stock at the price named; that the plaintiff did not learn of the sending of the telegram until February, 1918, and that at that time the bank stock in question had no value and became a total loss to plaintiff.

As special defenses in its answer defendant in error pleads that the message in question was an interstate message subject to the jurisdiction and

control of the Interstate Commerce Commission as to rules and regulations, and (1) that under the contract of transmission approved by such Commission a claim in writing must be presented within sixty days after the telegram was filed with the company, (2) under such approved contract this telegram was sent as an unrepeated message and defendant's liability thereon was limited to the amount received for sending the message, and (3) under such approved contract the message was not specially valued and therefore the liability could in no event exceed fifty dollars.

Defendant in error has filed in this court a motion to strike the alleged bill of exceptions in its entirety on the ground that it was not served or presented for settlement within the time allowed by the rules of the United States District Court for the District of Idaho, and that the alleged extension of time was not given until the Court had lost power over the cause by the failure to get an extension within the period limited by the rules. The principal questions presented on this record are accordingly:

1. The sufficiency of the alleged bill of exceptions.

2. If the motion to strike is denied whether this Court will consider the evidence in the absence of any special findings made or requested to be made by the Trial Court.

3. If the matter is properly presented for review, whether the Trial Court erred in denying the motion to remand, and if so, whether plaintiff in error did not waive the objection by going to trial.

4. If the merits of the case are before this Court for determination, whether or not the Court erred in entering judgment for defendant in error.

BRIEF OF THE ARGUMENT

No exceptions to rulings of the Trial Court can be considered on writ of error, unless embodied in a bill of exceptions, duly presented and allowed by the Trial Court.

Mich. Insurance Bank vs. Eldred, 143 U. S. 293, 36 L. Ed. 162.

Simkins Federal Suit at Law, page 98.

Yellow Poplar Lumber Co. vs. Chapman, 20 C. C. A. 507, 74 Fed. 444.

Buessel vs. U. S., 170 C. C. A. 105, 258 Fed. 811, 818.

Smith vs. U. S., 261 Fed. 605.

A bill of exceptions served and presented after the term has expired at which the ruling excepted to was made, without an order or rule of the Court authorizing such practice, is insufficient, and the Trial Court properly ordered that portion of the bill of exceptions relating to the motion to remand stricken from the transcript.

Rule 76 Idaho District (Tr. page 120).

Simkins Fed. Suit at Law, page 98.

Mich. Ins. Bank vs. Eldred, *supra.*

U. S. vs. Jones, 149 U. S. 262, 37 L. Ed. 726.

Jennings vs. Philadelphia, etc. Railroad Company, 218 U. S. 255, 54 L. Ed. 1031.

The bill of exceptions was not settled within the time limited by rule 76 of the Idaho District and no order extending the time was made until long after the period had expired, hence the entire bill of exceptions should be stricken from the transcript and the judgment affirmed.

Simkins Fed. Suit at Law, page 98.

Oxford and Coast Line Railroad Company vs. Union Bank, 82 C. C. A. 409, 153 Fed. 723.

U. S. vs. Jones, *supra.*

Jennings vs. Philadelphia, etc. Co., *supra.*

Dalton vs. Hazelet, 105 C. C. A. 99, 182 Fed. 561.

Yellow Poplar Lumber Co. vs. Chapman, 20 C. C. A. 507, 74 Fed. 444.

Wyss Thalman vs. Maryland Casualty Co., 113 C. C. A. 383 (3d Circuit) 193 Fed. 53.

Rupert vs. United States, 104 C. C. A. 255 (8th Circuit) 181 Fed. 87.

Franklin County vs. Furry, 75 C. C. A. 465 (7th Circuit) 144 Fed. 663.

Adams vs. Shirk, 58 C. C. A. 159 (7th Circuit) 121 Fed. 823.

Reliable Incubator Co. vs. Stahl, 32 C. C. A. 522 (7th Circuit) 102 Fed. 590.

Miller vs. Morgan, 14 C. C. A. 312 (5th Circuit) 67 Fed. 82.

M. K. & T. R. R. Co. vs. Russell, 9 C. C. A. 108 (8th Circuit) 60 Fed. 501.

United States vs. Thibodeaux, 146 C. C. A. 283 (5th Circuit), 232 Fed. 91.

Mound Coal Co. vs. Jeffrey Mfg. Co., 147 C. C. A. 587 (4th Circuit) 233 Fed. 913, 917.

Scaife vs. Western etc. Land Co., 30 C. C. A. 661 (4th Circuit) 87 Fed. 310.

Mahoning Valley Ry. Co. vs. O'Hara, 116 C. C. A. 495 (6th Circuit) 196 Fed. 945.

Reader vs. Haggin, 88 C. C. A. 91 (2nd Circuit) 160 Fed. 909.

Robertson vs. Cockrell (C. C. A. 5th Circuit) 209 Fed. 843.

City of Harper vs. Daniels, 129 C. C. A. 242 (8th Circuit) 211 Fed. 57.

Morse vs. Anderson, 150 U. S. 156, 37 L. Ed. 1037.

The act of February 26, 1919, amending Section 269 of the Judicial Code did not do away with the necessity for a bill of exceptions because without a proper bill of exceptions neither the evidence nor the rulings at the trial are part of the "record before the Court".

Buessel vs. United States, 170 C. C. A. 105, 258 Fed. 811, 818.

Smith vs. United States, 261 Fed. 605.

No good cause is shown for the delay in serving the bill of exceptions, and the filing of petition for new trial after the time for bill of exceptions had expired cannot extend the time for serving such bill.

Russo-Chinese Bank vs. National Bank of Commerce, 109 C. C. A. 398, 187 Fed. 80.

S. P. R. R. Co. vs. Johnston, 16 C. C. A. 317, 69 Fed. 559.

Idaho Compiled Statutes, Sec. 6882.

Swartz vs. Davis, 9 Ida. 238, 74 Pac. 800.

Sandstrom vs. Smith, 11 Ida. 779, 84 Pac. 1060.

The Court rules in relation to bill of exceptions should be observed.

Oxford and Coast Line Ry. Co., vs. Union Bank, 82 C. C. A. 609, 153 Fed. 723.

Mich. Ins. Bank vs. Eldred, 143 U. S. 298, 36 L. Ed. 162.

When a law case is tried by the Court without a jury and there are no special findings, the Appellate Court will not determine the sufficiency of the evidence and the opinion of the Trial Court cannot be resorted to for the purpose of supplying special findings.

British Queen Mining Co. vs. Baker Silver Mining Co., 139 U. S. 199, 35 L. Ed. 147.

Dickinson vs. Planters Bank, 83 U. S. 250, 21 L. Ed. 278.

Northern I. & M. Power Co. vs. A. L. Jordan Lumber Co., 262 Fed. 765.

Pennsylvania Casualty Co. vs. Whiteway, 210 Fed. 782, 127 C. C. A. 332.

Societe Nouvelle D'Armement vs. Barnaby, 246 Fed. 68, 158 C. C. A. 294.

Dunsmuir vs. Scott, 217 Fed. 200-202, 133 C. C. A. 794.

H. F. Dangberg L. & Ls. Co. vs. Day, 247 Fed. 477-478, 159 C. C. A. 531.

Maryland Casualty Co. vs. Orchard L. & T. Co., 240 Fed. 364, 153 C. C. A. 290.

National Surety Co. vs. Lincoln Co. Mont. 238 Fed. 705-708.

Sierra L. & Ls. Co. vs. Desert P. & M. Co., 229 Fed. 982, 144 C. C. A. 264.

Pabst Brewing Co. vs. E. Clemens Horst Co., 264 Fed. 909, C. C. A. (9th Circuit).

The motion to remand was properly denied on the facts and the Trial Court's finding on conflicting evidence will not be reversed.

Schoenwald vs. Bishop, 244 Fed. 715, 718.

Even if plaintiff was a citizen of California, the Court has jurisdiction because the requisite diversity of citizenship existed and the privilege of objecting to the venue was a privilege personal to the defendant.

L. & N. Railway Co. vs. Western Union Tel. Co., 218 Fed. 91.

Hohenberg vs. Mobile Liners, 245 Fed. 169.

Bogue vs. Atchison etc. Ry. Co., 193 Fed. 728.

Bagenas vs. Southern Pac. Co., 180 Fed. 887.

Keating vs. Pennsylvania Co., 245 Fed. 155.

Park Square Automobile Co. vs. American Locomotive Co., 222 Fed. 979.

Doherty vs. Smith, 233 Fed. 132.

Earles vs. Germain Co., 265 Fed. 718.

Any objection plaintiff might have had on the ground that the suit was not pending in the proper district was waived when he went to trial without objection.

Re Moore, 209 U. S. 490, 52 L. Ed. 904.

Western Loan & Savings Co. vs. Butte Co., 210 U. S. 368, 52 L. Ed. 1101.

Kreigh vs. Westinghouse Co., 214 U. S. 506, 53 L. Ed. 1061.

The pleadings and evidence show that the sender of the telegram was plaintiff's agent and plaintiff is accordingly bound by the provisions of the contract of transmission.

Coit vs. Western Union Tel. Co., 130 Cal. 657, 63 Pac. 83.

Halsted vs. Postal Tel. Co., 193 New York 293, 19 L. R. A. (N. S.) 1021.

New York Fruit Market vs. Western Union Tel. Co., 190 App. Div. (N. Y.) 160.

Dant vs. Western Union Tel. Co., 42 App. Cas. (D. C.) 398.

Anniston Cordage Co. vs. Western Union Tel. Co., 161 Ala. 216, 30 L. R. A. (N. S.) 1116.

Even though plaintiff brings his action in tort on the theory of a legal duty, he is bound by the terms of the contract of transmission, for without such contract there would be no legal duty.

McGehee vs. Western Union Tel. Co., Ala. 57 So. 205.

Gardner vs. Western Union Tel. Co., 145 C. C. A. 399, 231 Fed. 405.

Western U. Tel. Co. vs. Culberson, 79 Tex. 65, 19 S. W. 219.

Stone vs. Postal Tel. etc. Co. (R. I.) 76 Atl. 762, 29 L. R. A. (N. S.) 795.

Western U. Tel. Co. vs. Bank of Spencer, 53 Okla. 398, 156 Pac. 1175.

Bailey vs. Western U. Tel. Co., 97 Kan. 619, 156 Pac. 716.

Western U. Tel. Co. vs. Schade, (Ky.) 192 S. W. 924.

Western U. Tel. Co. vs. Lee, (Ky.) 192 S. W. 70.

Meadows vs. Postal Tel. etc. Co., (N. C.) 91 S. E. 1109.

Western U. Tel. Co. vs. Orr, (Okla.) 158 Pac. 1139.

Poor vs. Western U. Tel. Co., 196 Mo. App. 557, 196 S. W. 28.

Jacobs vs. Western U. Tel. Co., 196 Mo. App. 300, 196 S. W. 31.

Klotz vs. Western U. Tel. Co., 175 N. W. 825, and

Postal Tel. Cable Co. vs. Warren Godwin Co., 251 U. S. 27, 64 L. Ed., where the Gardner case is expressly approved.

The legal duty of a telegraph company in relation to interstate messages is determined by the Interstate Commerce Act and the rules and regulations

of the company on file with the Interstate Commerce Commission and approved by it.

Act of June 18, 1910, 36 St. L. 539-554, 4 F. S. A. (Ind. Ed.) page 337, Secs 1a and 1c.

Postal Telegraph Cable Co. vs. Warren-Godwin Lumber Co., 251 U.S. 27, 64 L. Ed.....

Western Union Tel. Co. vs. Boegli, 251 U. S. 315, 64 L. Ed.....

Gardner vs. Western Union Tel. Co., 145 C. C. A. 399, 231 Fed. 405.

The Court was without jurisdiction to determine that any of the provisions of the contract for the transmission of this telegram were unreasonable, as that matter must be determined by the Interstate Commerce Commission and the Commission has held these regulations to be reasonable, a determination not subject to collateral attack.

United States vs. M. & M. Traffic Association, 242 U. S. 178, 61 L. Ed. 233, 239.

Williams vs. Western Union Tel. Co., 203 Fed. 140, 145.

Gardner vs. Western Union Tel. Co., *supra.*

Western Union Tel. Co. vs. Bank of Spencer, 53 Okla. 298, 156 Pac. 1175.

Potlatch Lumber Co. vs. Spokane Ry. Co., 157 Fed. 288.

Great Northern Railroad Co. vs. Kalispell Lumber Co., 91 C. C. A. 63, 165 Fed. 25.

Erie Railroad Co. vs. Stone, 244 U. S. 332, 61 L. Ed. 1173.

The Interstate Commerce Commission has upheld the reasonableness of the provisions on the telegraph blank in question and such decision has been approved by the Supreme Court of the United States.

Cultra vs. Western Union Tel. Co., 44 I. C. R. 670.

Postal Tel. Cable Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27.

The clause requiring written notice of the claim within sixty days from the time the telegram is filed for transmission is reasonable and is a complete defense in this case.

Gardner vs. Western Union Tel. Co., 145 C. C. A. 399, 231 Fed. 405.

Postal Tel. Cable Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27.

Whitehill vs. Western U. Tel. Co., 136 Fed. 499.

Manier vs. Western U. Tel. Co., 94 Tenn. 442, 29 S. W. 732.

Western U. Tel. Co. vs. Bank of Spencer, 53 Okla. 398, 156 Pac. 1175.

Western U. Tel. Co. vs. Kaufman (Okla.), 162 Pac. 708.

Gooch vs. Oregon Short L. Ry. Co. (C. C. A. 9th Circuit), 264 Fed. 664.

Georgia, Florida etc. Ry. Co. vs. Blish Milling Co., 241 U. S. 90, 60 L. Ed. 948.

St. Louis & Iron Mountain Ry. Co. vs. Starbird, 243 U. S. 592, 61 L. Ed. 917.

Erie R. R. Co. vs. Stone, 244 U. S. 332, 61 L. Ed. 1173.

Southern Pacific Co. vs. Stewart, 244 U. S. 446, 63 L. Ed. 350.

The most that plaintiff in error could claim in this case was the right to give written notice within sixty days from discovery and this he failed to do.

Postal Tel. etc. Co. vs. Nichols, 89 C. C. A. 585, 159 Fed. 643.

Western U. Tel. Co. vs. Lee, 174 Ky. 210, 192 S. W. 70.

No waiver of the sixty-day clause is shown by the evidence and it would seem under the authorities that this provision could not be waived.

Gooch vs. Oregon Short L. Ry. Co., 264 Fed. 664.

Kerns vs. Western U. Tel. Co. (Mo.), 198 S. W. 1132.

Georgia, Fla., etc. Ry. Co. vs. Blish Milling Co., 241 U. S. 90, 60 L. Ed. 948.

So. Pac. Co. vs. Stewart, 244 U. S. 446, 63 L. Ed. 350.

Upon this question decisions of the State Courts and the lower Federal Courts on causes of action arising prior to 1910 and the insurance cases are not authoritative.

Postal Tel. Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27.

The unrepeated message clause is not one exempting the company from liability for negligence, but is merely a reasonable condition appropriately adjusting the charge for the service to the duty and responsibility exacted for its performance, and under such unrepeated clause plaintiffs recovery would at the most be limited to the amount paid by his agent for sending the message.

Primrose vs. Western Union Telegraph Co., 154 U. S. 1, 38 L. Ed. 883.

Postal Tel. Cable Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27, 64 L. Ed.....

Western U. Co. vs. Bank of Spencer, 53 Okla. 398, 156 Pac. 1165.

Bailey vs. Western U. Tel. Co., 97 Kan. 619, 156 Pac. 716, affirmed on rehearing, 99 Kan. 7, 160 Pac. 985.

Western U. Tel. Co. vs. Lee (Ky.), 192 S .W. 70.

Meadows vs. Postal Tel. Co. (N. C.) 91 S. E. 1009.

Haskell Implement Co. vs. Postal Tel. Co. (Me.) 96 Atl. 219.

Western U. Tel. Co. vs. Hawkins, 14 Ala. App. 295, 73 So. 973.

Boyce vs. Western U. Tel. Co. (Va.) 89 S. E. 106.

Western U. Tel. Co. vs. Orr (Okla.) 158 Pac. 1139.

Western U. Tel. Co. vs. Kaufman (Okla.), 162 Pac. 708.

The cases cited on the question of gross negligence in plaintiff's brief must, since the decision of the Supreme Court of the United States in the Warren-Godwin case, be considered as authority only on the special facts there involved.

Cultra vs. Western U. Tel. Co., 44 I. C. R. 670, 675.

Primrose vs. Western U. Tel. Co., 154 U. S. 1, 38 L. Ed. 883.

Postal Tel. Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27.

Hartness vs. Western U. Tel Co., 99 S. E. (S. C.) 759.

The unrepeated clause applies to delays in delivery or failure to deliver, as well as to mistakes in transmission.

Gardner vs. Western U. Tel. Co., 145 C. C. A. 399, 231 Fed. 405.

Bailey vs. Western U. Tel. Co., 97 Kan. 619, 156 Pac. 716.

Western U. Tel. Co. vs. Lee, 192 S. W. 70.

Western U. Tel. Co. vs. Hawkins, 14 Ala. App. 295, 73 So. 973.

Western U. Tel. Co. vs. First National Bank, 83 S. E. 424.

Western Union Tel. Co. vs. Orr (Okla.), 158 Pac. 1136.

Western U. Tel. Co. vs. Kaufman (Okla.), 162 Pac. 708.

The clause exempting defendant company from liability for more than fifty dollars unless the telegram was specially valued is a valid defense to that extent and regardless of the character of the negligence involved, the maximum of plaintiff's recovery must be limited to fifty dollars.

Klotz vs. Western U. Tel. Co. (Ia.), 175 N.W. 825.

Western U. Tel. Co. vs. Compton, 114 Ark. 193, 169 S. W. 946.

Jacobs vs. Western U. Tel. Co., 196 Mo. App. 300, 196 S. W. 31.

Postal Tel. Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27.

Western Union Tel. Co. vs. Kaufman (Okla.) 162 Pac. 708.

Cultra vs. Western U. Tel. Co., 44 I. C. R. 670.

Western U. Tel. Co. vs. Schade, 192 S. W. 924.

Bailey vs. Western U. Tel. Co., 97 Kan. 619, 156 Pac. 716.

Hartness vs. Western U. Tel. Co., 99 S. E. 759.

Kerns vs. Western U. Tel. Co. (Mo.), 198 S. W. 1132.

Similar valuation clauses as a basis for making rates by railroads and express companies have been uniformly upheld and the liability limited to the amount stipulated, regardless of the character of the negligence.

Erie Ry. Co. vs. Stone, 244 U. S. 332, 61 L. Ed. 1173.

Adams Express Co. vs. Croninger, 226 U. S. 491, 57 L. Ed. 314.

M. K. & T. Ry. Co. vs. Harriman, 227 U. S. 657, 670, 57 L. Ed. 690.

C. C. C. & St. Louis Ry. Co. vs. Deitlebach, 239 U. S. 588, 60 L. Ed. 453.

Chicago, New Orleans, etc. Co. vs. Rankin, 241 U. S. 919, 60 L. Ed. 1022.

B. & M. R. R. Co. vs. Hooker, 233 U. S. 97, 58 L. Ed. 868.

Plaintiff's testimony as to what he would have done was inadmissible and properly excluded by the Court.

Western U. Tel. Co. vs. Hall, 124 U. S. 44, 31 L. Ed. 479.

Western U. Tel. Co. vs. Ferguson, 54 L. R. A. 846.

Hall vs. Western U. Tel. Co., 51 So. 819, 27 L. R. A. (N. S.) 639.

Kiley vs. Western U. Tel. Co., 39 Hun. 158. Affirmed 109 New York, 231.

Bass vs. Postal Tel. Co., 127 Ga. 423, 53 S. E. 465.

Wilson vs. Western U. Tel. Co., 124 Ga. 131, 52 S. E. 153.

Western U. Tel. Co. vs. Webb, 48 So. 408.

Richmond H. Mills vs. Western U. Tel. Co., 123 Ga. 216, 51 S. E. 290.

Bennett vs. Western U. Tel. Co., 129 Ia. 607, 106 N. W. 13.

Smith vs. Western U. Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126.

Western Union Tel. Co. vs. Adams Mach. Co., 92 Miss. 849, 47 So. 412.

Cherokee T. Ex. Co. vs. Western Union Tel. Co., 143 N. C. 376, 55 S. E. 777.

Harmon vs. Western U. Tel. Co., 65 S. C. 490, 43 S. E. 959.

Beatty L. Co. vs. Western U. Tel. Co., 52 W. Va. 410, 44 S. E. 309.

Fisher vs. Western Union Tel. Co., 119 Wis. 146, 96 N. W. 545.

Western U. Tel. Co. vs. Watson, 94 Ga. 202, 21 S. E. 457.

ARGUMENT

THERE IS NO PROPER BILL OF EXCEPTIONS BEFORE THE COURT.

At the outset of the discussion of the case at bar we are confronted by two questions of practice, the determination of which will decide the extent to which this Court will have to examine the record in order to determine the case. The first of these questions is raised by the motion of defendant in error to strike the alleged bill of exceptions from the transcript for the reason that it was not seasonably filed and if this motion is sustained, it will necessitate an affirmance of the judgment because all the errors assigned by plaintiff arise upon such bill of exceptions (Tr. pp. 124-127), and no error is or can be assigned upon the record proper consisting of the pleadings and the judgment.

The first assignment of error (Tr. p. 124) challenges the correctness of the ruling upon motion to remand, but this question is not properly before this Court, because the learned Trial Judge at the time that he allowed the balance of the bill of exceptions ordered this portion of the bill stricken out (Tr. p. 120). He did, however, allow an exception to such ruling and assignment of error No. 13 attacks such ruling. The present writ of error, however, is to the judgment dated May 8, 1920, while this ruling was made July 16, 1920, and we do not see how plaintiff in error can attack, on a writ of error from the judgment, a ruling made over two months after such judgment was entered. If he had any remedy at all, it was by a petition to this Court for a writ of mandamus to compel the Trial Court to settle the bill of exceptions as presented, or by a writ of error to the ruling excepted to. There can be no question, however, but that the Trial Court was justified in striking this portion from the bill of exceptions. It appears that the motion to remand was denied October 10, 1919, and the bill of exceptions was not served or presented within the ten days allowed by the Court rule, or at that term of Court, and no extension whatever was obtained and no bill of exceptions was prepared or served until July 2, 1920, over eight months after the time for serving the bill had expired.

Rule 76 of the Trial Court provides in part as follows (Tr. pp. 120-121) :

"A bill of exceptions to any ruling may be reduced to writing and settled and signed by the Judge at any time the ruling is made, or at any subsequent time during the trial, if the ruling was made during a trial, or within such time as the Court or Judge may allow by order made at the time of the ruling, or if the ruling was during a trial, by order made at any time during the trial, or within the time hereinafter mentioned, and when so signed shall be filed with the Clerk.

"If not settled and signed as above provided, a bill of exceptions may be settled and signed as follows: *The party desiring the bill shall*, within ten days after the ruling was made, or if such ruling was made during a trial, within ten days after the rendition of the verdict, or, if the case was tried without a jury *within ten days after written notice of the rendition of the decision, serve upon the adverse party a draft of the proposed bill of exceptions.*" (Our italics.)

The general rule on this question is thus stated in Simkins Federal Suit at Law, page 98.

"The bill must be duly presented to and allowed by the Trial Judge during the term at which the trial was had; or within the time extended by the Trial Judge during the term, or, if there be a rule of the Court or Circuit governing the time for presentation for allowance, it

must be followed, or an extension granted within time allowed by the rule.

* * * * * * * * *

"The rules fixing the time for presentation and allowance of a bill of exceptions are directory, and to subserve the ends of justice the Trial Judge may extend the time, provided the exceptions incorporated in the bill were taken during the trial, and when the matters excepted were offered; *and provided, further, the extension was granted* within the time allowed by rule for the presentation and allowance of the bill. The Trial Court cannot extend the time when the application was made, after the time limited by the rule had expired." (Our italics.)

Numerous authorities are cited in support of this proposition and it is clearly established that a bill of exceptions cannot be settled after the term at which the ruling was made unless the Court in some way retains jurisdiction so to do. The record shows that on June 17, 1920, some eight months after the time for this bill of exceptions expired under Rule 76 and four months after the term at which the ruling was made expired, plaintiff in error for the first time sought an extension of time for his bill of exceptions.

In Michigan Insurance Bank vs. Eldred, 143 U. S. 293, 36 L. Ed. 162, at page 163, the Court said:

"By the uniform course of decision, no exceptions to rulings at a trial can be considered

> by this Court unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of Court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the Judge and filed with the Clerk during the same term. After the term has expired, without the Court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this Court, all authority of the Court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end."

It is clear, therefore, that even if the action of the Trial Court is subject to review here on this writ directed against the judgment, the Trial Court did not err in striking this portion of the proposed bill of exceptions and accordingly the evidence on the motion to remand is not properly before this Court.

The portion of the bill relating to the rulings at the trial and the evidence presents a slightly different question, because it was allowed by the Trial Court at the term during which the judgment was entered, though not served or presented until long after the time limited by the rule had expired. The judgment was rendered and notice thereof served in accordance with the rule on May 8th, 1920, and

under Rule 76 quoted above, the time for serving the bill expired on May 18, 1920. Under Rule 75 the time in which plaintiff in error might file his petition for new trial did not expire untl June 7th, 1920. Accordngly, on June 5, 1920, eighteen days after the time for serving his bill of exceptions had expired, and without obtaining any order extending such time or any stipulation, plaintiff in error served his petition for new trial and on June 17, 1920, thirty days after the time for serving his bill of exceptions had expired, he first asked for an extension and the Court granted twenty days additional time for his bill of exceptions. Within such time the bill of exceptions was served and thereafter it was settled and allowed over defendant's objection. On this state of facts defendant in error has moved to strike the entire bill of exceptions from the record. And we submit that such motion should be sustained and the judgment affirmed. Under the rule as stated by Simkins, which we have quoted above, the order of extension made on June 17, 1920, was inoperative and void because it was not made until after the time fixed by the rule had expired. In Oxford and Coast Line R. R. Co. vs. Union Bank, 82 C. C. A. 609 (4th Circuit) 153 Fed. 723, the Court lays down the rule as follows:

> "In the absence of a rule to the contrary, a party against whom there is a judgment in an action at law is entitled to prepare and file a bill of exceptions during the term at which the case was tried relating to questions reserved at

the trial. However, in the district in which this case was tried there is a rule of Court which only allows twenty days in which to prepare and file a bill of exceptions. Notwithstanding this rule, the Court had the power to extend the time in which to prepare and file a bill of exceptions, provided it did so within twenty days, but, once the Court permitted the twenty days to expire, then it no longer had the power to extend the time, and the case would stand just as though the term had expired."

The Supreme Court of the United States states the rule clearly in its opinion in United States vs. Jones, 149 U. S. 262, 37 L. Ed. 726, which we quote in full:

"Judgment was rendered in this case July 18, the writ of error sued out and allowed July 23, and the Court adjourned for the term July 30, 1889. So far as disclosed by the record the bill of exceptions was not tendered to the judge or signed by him until October 7, 1889, and no order was entered extending the time for its presentation, nor was there any consent of parties thereto, nor any standing rule of Court which authorized such approval. The bill of exceptions was therefore improvidently allowed. Muller vs. Ehlers, 91 U. S. 249 (23:319); Jones vs. Grover & B. Sewing Mach. Co., 131 U. S. App. Cl. (24:925); Michigan Ins. Bank vs. Eldred, 143 U. S. 293 (36:162).

> *"As the errors assigned arise upon the bill of exceptions, we are compelled to affirm the judgment, and it is so ordered."*

In Jennings vs. Philadelphia etc. R. R. Co., 218 U. S. 255, 54 L. Ed. 1031, the facts were as follows: The Court of Appeals of the District of Columbia had sustained a motion to strike a bill of exceptions on the ground that it had been settled after the term without a special order extending the time beyond the term. Writ of error was brought and the Court held that the time having expired before the extension, all the proceedings were *coram nom judice* and void, and the order of the Court of Appeals was therefore affirmed.

In Dalton vs. Hazelet, 105 C. C. A. 99, 182 Fed. 561, and on page 568 this Court states:

> "The exceptions were not filed with the clerk until more than six months after the entry of the decree, but the appellants relied upon the order of March 29, allowing the defendants 90 days for preparing and settling exceptions. When the order was made, the time for filing exceptions had long since expired and the Court had no authority to extend the time."

Other cases sustaining this rule are the following:

Wyss Thalman vs. Maryland Casualty Co., 113 C. C. A. 383 (3d Circuit), 193 Fed. 53.

Rupert vs. United States, 104 C. C. A. 255 (8th Circuit), 181 Fed. 87.

Franklin County vs. Furry, 75 C. C. A. 465 (7th Circuit), 144 Fed. 663.

Adams vs. Shirk, 58 C. C. A. 159 (7th Circuit), 121 Fed. 823.

Reliable Incubator Co. vs. Stahl, 32 C. C. A. 522 (7th Circuit) 102 Fed. 590.

Miller vs. Morgan, 14 C. C. A. 312 (5th Circuit), 67 Fed. 82.

M. K. & T. R. R. Co. vs. Russell, 9 C. C. A. 108 (8th Circuit), 60 Fed. 501.

United States vs. Thibodeau, 146 C. C. A. 283 (5th Circuit), 232 Fed. 91.

Mound Coal Co. vs. Jeffrey Mfg. Co., 147 C. C. A. 587 (4th Circuit), 233 Fed. 913, 917.

Scaife vs. Western etc. Land Co., 30 C. C. A. 661 (4th Circuit), 87 Fed. 310.

Mahoning Valley Ry. Co. vs. O'Hara, 116 C. C. A. 495 (6th Circuit), 196 Fed. 945.

Reader vs. Haggin, 88 C. C. A. 91 (2nd Circuit) 160 Fed. 909.

Robertson vs. Cockrell (C. C. A. 5th Circuit), 209 Fed. 843.

City of Harper vs. Daniels, 129 C. C. A. 242 (8th Circuit), 211 Fed. 57.

Morse vs. Anderson, 150 U. S. 156, 37 L. Ed. 1037.

In the case of Buessel vs. United States, 170 C. C. A. 105 (2d Circuit), 258 Fed. 811, 818, the Court said:

> "The general rule has been that in actions at law evidence introduced, or offered and rejected, at the trial, and rulings thereon, can be

brought before the Appellate Court only by a bill of exceptions."

In Yellow Poplar Lumber Co. vs. Chapman, 20 C. C. A. 507 (4th Circuit) 74 Fed. 444 at page 448, the Court states:

> "It is now a rule of practice universally followed in the Courts of the United States that an exception to the ruling of a Trial Judge cannot be considered in the Appellate Court, unless it was duly noted during the trial, and preserved in a bill of exceptions, which was presented to and allowed by the Court at the term during which the trial was had, or within a time provided for by an order entered during such term; or where it had been allowed under the standing rules of the Court, or with the consent of the parties or under such circumstances as clearly show that it was the intention of the Court to, and that it did, retain by special order the control of said matter, for the purpose of examining, allowing, and signing the said bill of exceptions."

In Russo-Chinese Bank vs. National Bank of Commerce, 109 C. C. A. 398, 187 Fed. 80, this Court holds that in view of the special circumstances the rule might be dispensed with and that inasmuch as the order extending the time recited that it was for good cause shown the Trial Court's action would be accepted. But in the case at bar there is no attempt to show any cause or reason why the Court should extend the time long after the time limited by the rule

had expired. In the case last cited the Court commented on the difference between the state practice and the federal practice, but here the state practice was exactly the same. Section 6882 of the Idaho Compiled Statutes, 1919, which has been on the statute books of Idaho since 1881, provides as follows:

> "When a party desires to have exceptions taken at a trial, settled in a bill of exceptions he may within ten days * * * after receiving notice of the entry of the judgment, if the action were tried without a jury, or such further time as the Court in which the action is pending, or the Judge thereof, may allow, prepare a draft of the bill and serve the same or a copy thereof upon the other party."

The practice in the Idaho Courts has been exactly the same as that of the Federal Courts. See:

> Swartz vs. Davis, 9 Ida. 238, 74 Pac. 800.
> Sandstrom vs. Smith, 11 Ida. 779, 84 Pac. 1060.

Under these circumstances counsel for plaintiff in error cannot be heard to excuse himself on the ground of the state practice.

The only ground given by the Court for the extension of time is found in bill of exceptions where it is stated:

> "The Court considered the fact of the pendency of the motion for new trial and the Court allowed plaintiff's motion for an extension of twenty days within which to file and serve his proposed bill of exceptions."

It cannot be assumed, therefore, that the Court had any other reason, and we do not think that the pendency of the motion for new trial can avail plaintiff in error in this case, because such motion was not filed until after the time for the bill of exceptions had expired. In Southern Pacific Railway Company vs. Johnson, 16 C. C. A. 317, 69 Fed. 559, where this Court held that the pendency of a motion for new trial extended the time for a bill of exceptions, the motion for new trial was filed before the time for a bill of exceptions had expired under the rule and the Court apparently adopted the view that the pendency of such motion retained the matter in the Court's control, because if the new trial was granted no bill of exceptions would be necessary. The few other cases in which a motion for a new trial was held to extend the time for the bill were also cases where the application was made within the time in which a bill of exceptions could have been prepared or an order extending the time granted. In the case at bar, from May 18, 1920, when the time for the bill of exceptions expired, until June 5, 1920, 18 days later, the Court had entirely lost control over the case, and under the authorities above cited the subsequent filing of petition for new trial and the granting of the order of extension could not aid plaintiff in error because the time had already expired.

In Oxford and Coast Line Company vs. Union Bank, 82 C. C. A. 609, 153 Fed. 723, the Circuit Court of Appeals for the Fourth Circuit defined the

duty of counsel in relation to bills of exception at page 728 of the Federal Reporter in the following language:

> "While it is not the policy of the Court to dismiss writs of error and cases on appeal on account of slight technicalities, at the same time, the rules of this Court, as well as the rules of the Circuit Court, are plain and easily understood. In this instance the provision of the statute relating to the question at issue is mandatory and must be enforced. It is incumbent upon attorneys who practice in the Federal Courts to observe and strictly follow the rules of practice and procedure in preparing and presenting bills of exceptions.
>
> "In the case of Michigan Ins. Bank vs. Eldred, 143 U. S. 298, 12 Sup. Ct. 452, 36 L. Ed. 162, the Court, among other things, said:
>
> " 'The duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, belongs to the excepting party, and not to the Court. The Trial Court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the duty of the Court of Error is limited to determining the validity of exceptions duly tendered and allowed.'
>
> "It is essential to the orderly procedure of the Courts that attorneys should comply with

> the rules relating to the same; otherwise, it would be useless to promulgate rules for the guidance of those who may seek to review the action of the lower Court."

Notwithstanding the rule thus clearly laid down by the authorities, counsel for plaintiff in error at page 16 of his brief, in urging that this Court should consider the portion of the transcript which the Trial Court ordered stricken from the bill of exceptions, makes the following statement:

> "It seems to us that regardless of the technical question as to whether it was properly incorporated in the bill of exceptions or not, it may properly be considered by the Court as within the intent and spirit of the amendment of February 26, 1919, to Section 269 of the Judicial Code."

In Buessel vs. United States, *supra*, the Circuit Court of Appeals of the Second Circuit gives a very full discussion of the history and office of a bill of exceptions, and in the course of its opinion passes upon the effect of the 1919 statute, saying (258 Fed. 820):

> "From what has been said it is evident that, unless the established rules of law have been changed by recent legislation, this Court is not at liberty to review the evidence, to see whether any testimony has been erroneously admitted, or whether there were errors in the charge as actually given, or whether any requests to

charge were improperly refused. In Struthers vs. Drexel, *supra*, the Supreme Court declared that the matters not spread upon the record in legal manner are not in the record for any purpose; and it is also evident that, if the testimony and the charge and the requests to charge had been put into the record by a bill of exceptions, the Court would still be powerless to review any ordinary errors therein for want of exceptions duly taken.

"But we find that Congress, by an act approved on February 26, 1919 (40 Stat. 1181, c. 48), has amended section 269 of the Judicial Code by providing that:

" 'On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the Court shall give judgment after an examination of the entire record before the Court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties'.

"It becomes necessary, therefore, to consider to what extent this act has modified the principles above laid down. *We are to examine 'the entire record before the Court'. Now, we have seen that under the decisions of the Supreme Court the testimony and the charge and refusals of requests to charge are not in the record before the Court, although they may be found in the transcript, unless they have been put into the record by a bill of exceptions. We*

are not prepared to say that it was the intention of the Congress, by the act recently passed, to make bills of exceptions no longer necessary, and that hereafter we are to hold that any matter found in the transcript is to be regarded as in the record, even though the Trial Judge has not examined and certified to its correctness by putting his signature to a bill of exceptions. We do not think that such could have been the intention. The 'record' to which the act refers is that which is legally the record, and in examining that we are to disregard 'technical errors, defects or exceptions which do not affect the substantial rights of the parties'. But the matters which could not have been regarded as in the record prior to the passage of the act are not to be held to be in the record since the passage of the act. We are still unable to review the evidence, the charge, and the refusals to charge."

The above decision was followed by this Court in Smith vs. United States, 261 Fed. 605.

It seems clear, therefore, that the amendment of Section 269 cannot be relied upon in order to permit a review of the ruling on the motion to remand or in answer to defendant's motion to strike the bill of exceptions from the transcript, because this statute does not do away with the necessity for a bill of exceptions properly settled and allowed in order to obtain a review of the proceedings in the Court below.

We, accordingly, submit that the Trial Court very properly ordered that portion of the bill of exceptions relating to the motion to remand stricken therefrom and that this Court should sustain the motion of defendant in error to strike the balance of the bill of exceptions and thereupon affirm the judgment, for the reason that all of the errors assigned arise upon such bill of exceptions.

THERE BEING NO SPECIAL FINDINGS OF FACT, THIS COURT WILL NOT DETERMINE THE SUFFICIENCY OF THE EVIDENCE.

This cause was tried by the Court without a jury, pursuant to written stipulation, and the Court rendered an opinion in favor of the defendant in error (Tr. pp. 34-43). The record shows that no special findings were requested by counsel for either party, or made by the Court, and that there was no motion of any kind by either party calling for a ruling on the sufficiency of the evidence. Plaintiff in error has, however, attempted by his bill of exceptions to make it appear that the Court found on certain issues of fact, which findings were not sustained by the evidence. (Tr. pp. 107-111.) The bill of exceptions as allowed by the Court shows that all of these alleged findings were contained in the written opinion and assignments of error Nos. 3, 4, 7, 8, 9 and 10 are based entirely on the ground of insufficiency of the evidence to support such alleged findings. Hence, the question necessarily arises to what extent this Court will or can consider the evidence in this cause

in view of the absence of any special findings or any motion which would be the equivalent of a motion for a directed verdict if the case had been tried before a jury. And we find that the rule of practice is established with complete unanimity in this Court, the Circuit Courts of Appeals of other Circuits, and the Supreme Court of the United States, that the Federal Appellate Courts will not consider the sufficiency of the evidence in such cases and that the Court's opinion cannot be referred to as a means of determining the facts found by the Court.

In British Queen Min. Co. vs. Baker Silver Min. Co., 139 U. S. 199, 35 L. Ed. 147, the Court defines the rule as follows:

> "This case was tried by the Circuit Court without a jury, and under sections 649 and 700, Rev. Stat., the finding must be 'either general or special'. It cannot be both. Here there was a general finding.
>
> "The record contains a bill of exceptions, but no exceptions to the rulings of the Court in the progress of the trial of the cause were thereby duly presented, and although after reciting the evidence it is therein stated that 'the Court thereafter and during the said term made the following findings of fact and judgment thereon', which is followed by an opinion of the Court assigning reasons for its conclusions, this cannot be treated as a special finding enabling us to determine whether the facts found support the judgment, nor can the general finding be disregarded."

In the case at bar, there were no special findings and the record contains all the evidence as stated on page 55 of the transcript, but the Court made no finding except the general finding stated in the judgment. In Dickinson vs. Planters Bank, 83 U. S. 250, 21 L. Ed. 278, the record was similar to the case at bar and the Court declares:

> "It is, however, only when the finding is special that the review of this Court can extend to the determination of the sufficiency of the facts found to support the judgment. Here the record as returned contains what is stated to have been all the evidence in the cause, but the Court has not found what the evidence proves nor any other facts except that stated in the judgment. * * * Some facts indeed are stated in the opinion of the Court that seems to have accompanied the judgment, but they are not stated as a special finding. * * * We cannot therefore inquire whether the evidence as delivered by the witness was sufficient under the circumstances * * * but though the finding was general, any ruling of the Court in the progress of the trial if excepted to at the time and duly presented by bills of exceptions may be reviewed by us."

In the recent case of Northern Idaho and Montana Power Co. vs. A. L. Jordan Lumber Co., 262 Fed. 765, at page 766, this Court said:

> "On the trial no exceptions were taken to any ruling of the Court, and no request was made

for special findings, or for a finding in favor of the defendant in the action. *The plaintiff in error refers to the opinion of the Court below as containing special findings of fact, but the opinion cannot be resorted to for that purpose.* Dickinson vs. Planters Bank, 16 Wall. 257, 21 L. Ed. 278; British Queen Min. Co. vs. Baker Silver Min. Co., 139 U. S. 222, 11 Sup. Ct. 523, 35 L. Ed. 147; Saltonstall vs. Birtwell, 150 U.S. 417, 14 Sup. Ct. 169, 37 L. Ed. 1128; York vs. Washburn, 129 Fed. 564, 64 C. C. A. 132; Hayden vs. Ogden Savings Bank, 138 Fed. 91, 85 C. C. A. 558; United States vs. Sioux City Stock Yards Co., 167 Fed. 127, 92 C. C. A. 518; Gibson vs. Luther, 196 Fed. 203, 116 C. C. A. 35.

"In the absence of a special finding, the judgment must be affirmed, unless the complaint fails to state a cause of action, or the bill of exceptions presents some erroneous ruling of the Court in the progress of the trial. Norris vs. Jackson, 9 Wall. 125, 19 L. Ed. 608. There being in the present case no ruling of the Trial Court, and no special finding of fact, but only a general finding, the latter must be accepted as conclusive, and this Court can go no further than to affirm the judgment. Lehnen vs. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; Dunsmuir vs. Scott, 217 Fed. 200, 133 C. C. A. 194; Pennsylvania Casualty Co. vs. Whiteway, 210 Fed. 782, 127 C. C. A. 332." (Our italics.)

Numerous other cases to the same effect decided by this Court are cited in the Brief of the Argument above, and as the rule is so thoroughly established we will not repeat them here. We have been unable to find any exception to this rule in the decisions of this Court, and for that reason we will not go into an extended discussion of the evidence presented to the Trial Court on the trial.

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION TO REMAND.

As we have already pointed out, the portion of the bill of exceptions relating to the hearing on motion to remand was ordered stricken by the Trial Court (Tr. p. 120), and the exception to such ruling is not properly reviewable upon the present writ of error. We have also pointed out that the Act of February 26, 1919, amending section 269 of the Judicial Code, does not relieve plaintiff in error from the necessity of furnishing this Court a bill of exceptions duly settled and allowed covering the ruling he seeks to attack.

Buessel vs. U. S., 170 C. C. A. 105, 258 Fed. 811.

Smith vs. U. S., 261 Fed. 605.

If the Court should, however, consider this record, it would be seen at once that the Trial Court's action was correct and proper. Plaintiff in error contended that he was a citizen of California, and therefore the action was not pending in the proper district. The Trial Court found that he was not a citizen of

California but was a citizen of Idaho and there was ample evidence to sustain such ruling, because the record showed that he had held office and voted in the State of Idaho long after he bought a house in California and until shortly before the action was brought, and the record also showed that he registered at Idaho hotels giving his residence as Warren, Idaho. In such a case the finding of the Trial Court on a disputed question of fact will not be reversed.

Schoenwald vs. Bishop (C. C. A. 9th Circuit), 244 Fed. 715, 718.

Even if plaintiff in error had been a citizen of California so that the suit would not have been maintainable in the Idaho District over defendant's objection, there is, nevertheless, ample authority for denying the motion to remand on the ground that the privilege is one personal to the defendant which is waived by the petition for removal. See:

L. & N. Railway Co. vs. Western Union Tel. Co., 218 Fed. 91.
Hohenberg vs. Mobile Liners, 245 Fed. 169.
Bogue vs. Atchison etc. Ry. Co., 193 Fed. 728.
Bagenas vs. Southern Pac. Co., 180 Fed. 887.
Keating vs. Pennsylvania Co., 254 Fed. 155.
Park Square Automobile Co. vs. American Locomotive Co., 222 Fed. 979.
Doherty vs. Smith, 233 Fed. 132.
Earles vs. Germain Co., 265 Fed. 718.

In any event, plaintiff in error signed stipulations and went to trial in the Federal Court without mak-

ing any objection and without preserving any bill of exceptions to the ruling he now seeks to reverse, and by so doing he waived any objections he might have had to the venue of the action.

Re Moore, 209 U. S. 490, 52 L. Ed. 904.

Western Loan & Savings Co. vs. Butte Co., 210 U. S. 368, 52 L. Ed. 1101.

Kreigh vs. Westinghouse Co., 214 U. S. 506, 53 L. Ed. 1061.

THE PROVISIONS OF THE CONTRACT FOR THE TRANSMISSION OF THIS TELEGRAM ARE BINDING UPON PLAINTIF AND PREVENT HIS RECOVERY.

In addition to the first defense in the answer, defendant in error has pleaded three separate affirmative defenses based upon the provisions found on the back of the telegraph blank on which the telegram in question was written. This telegram and the blank are set out in full in the record (Tr. pp. 29-34). Defendant's Exhibit B. (Tr. pp. 99-104) is a copy of the blank on which this telegram was written, certified by the Secretary of the Interstate Commerce Commission as being on file with the Commission, but by inadvertance in preparing the bill of exceptions the message itself has been copied on this blank. Both these exhibits are on file with this Court.

The clauses in the contract of transmission specially pleaded by defendant are as follows:

"*All telegrams taken by this company are subject to the following terms*:

"To guard against mistakes or delays, the sender of a telegram should order it REPEATED, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated telegram rate is charged in addition. Unless otherwise indicated on its face, THIS IS AN UNREPEATED TELEGRAM AND PAID FOR AS SUCH, in consideration whereof it is agreed between the sender of the telegram and this company as follows:

"1. The company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any UNREPEATED telegram, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery, of any REPEATED telegram, beyond fifty times the sum received for sending the same, *unless specially valued;* nor in any case for delays arising from unavoidable interruption in the working of its lines; *nor for errors in cipher or obscure telegrams.*

"2. In any event the company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, whether caused by the negligence of its servants or otherwise, beyond the sum of FIFTY DOLLARS, at which amount this telegram is hereby valued, unless

a greater value is stated in writing hereon at the time the telegram is offered to the company for transmission, and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof. * * *

"6. The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed with the company for transmission." (Tr. pp. 99-101.)

We contend that these provisions are binding upon plaintiff in error and bar his recovery whether he bases his action upon the ground that T. J. Jones, who sent the telegram, was his agent or upon the ground that defendant company owed him a legal duty to transmit and deliver the telegram promptly in view of its status as a public service corporation. Plaintiff in error argues that there was no relation of agency between him and Jones, who sent the telegram, but necessarily if Jones was plaintiff's agent in the transaction, plaintiff is bound by the terms of the contract under which the telegram was transmitted. The complaint and the admission of plaintiff in the record shows clearly that an agency existed or at least that the telegram was sent at the express request of plaintiff.

In paragraph III of the complaint (Tr. p. 8) it is alleged:

"That the plaintiff desired to sell his said fifty shares of stock and was then about to leave Boise for his home in Oakland, California.

That prior to his departure for California, and early in the month of November, 1917, plaintiff had an oral understanding with one T. J. Jones, who resides at Boise, Idaho, and who was also an owner of stock in said Idaho National bank, and who also desired to sell his stock, which understanding was that plaintiff and said Jones should endeavor to sell their said stock jointly, and that said Jones should notify plaintiff at his home in Oakland, California, whenever said Miller was ready to purchase their said stock."

In paragraph V (Tr. pp. 8 and 9), it is alleged:

"That on the 30th day of November, 1917, the said T. J. Jones acting under the arrangement with plaintiff set forth in paragraph III hereof presented to the defendant at its office in Boise, Idaho, a certain message which was typewritten upon one of defendant's telegraph blanks, etc."

In plaintiff's letter of June 18, 1918, to defendant, he states:

"I was extremely desirous of selling this stock and this offer would have been immediately accepted if this telegram had been delivered to me. *It was sent to me by my associate and agent*, Mr. T. J. Jones, of Boise, Idaho. After being delivered to your company the price of the telegram was paid by Mr. Jones for me."

Certainly upon this state of facts Jones was plaintiff's agent for sending the message, and if so, under

the clearest principles of law he was bound by the contract of his agent for the transmission of the message. In Coit vs. Western Union Tel. Co., 130 Cal. 657, 63 Pac. 83, the Court states:

> "In discussing this identical question, Thompson on the Law of Electricity (section 237) says: 'In such a case is the receiver of the message bound by the stipulation, assuming that the sender was bound by it? If the right of action which the receiver has against the company rests upon privity of contract, and depends upon the circumstances that the sender was his agent—in other words, if the contract with the telegraph company was the contract of the receiver through his agent, the sender—then, on the most unshaken ground, the receiver would be bound by this condition, if the circumstances were such that it would bind the sender'. Now, in this state, by the authorities already cited, it is plain that Dennis was bound by the stipulation; and, having power to make it, his principal can only stand in his shoes."

In Halsted vs. Postal Tel. C. Co., 193 N. Y. 293, 19 L. R. A. (N. S.) 1021, and on page 1027, the Court states:

> "It is our judgment that, where the receiver of a message has, by a special request, procured it to be sent by the telegraph, he becomes bound by any reasonable contract made by the sender with the telegraph company for its transmis-

sion, and is limited in his claim for any damages for a loss occasioned by error or mistake in transmission, where the stipulations for the repetition or for the insurance of the message have not been availed of, to the amount stipulated in the contract."

New York Fruit Market vs. Western Union Tel. Co., 190 App. Div. (N. Y.) 160.

Dant vs. Western Union Tel. Co., 42 App. Cas. (D. C.) 398.

Anniston Cordage Co. vs. Western Union Tel. Co., 161 Ala. 216, 30 L. R. A. (N. S.) 1116, note.

It is true that in paragraph V of the complaint plaintiff alleges that the "defendant received and accepted said message and became thereby obligated to forward same by telegraph to plaintiff in Oakland, California", thus apparently attempting to base his action upon a supposed legal duty of defendant as a public service company rather than upon the contract, and he contends that for this reason he is not bound by the provisions we have quoted. But for the sake of argument let us assume that the action is in tort. The legal duty was only to deliver the telegram in accordance with the contract and the rules and regulations of defendant company as approved by the Interstate Commerce Commission. In the absence of the contract there was no legal duty whatever, and although plaintiff was merely the addressee of the telegram, his alleged right of

action is necessarily based upon the contract and he cannot at the same time claim the benefit of such contract and repudiate its terms.

In the case of McGehee vs. Western Union Telegraph Company (Ala.) 50 So. 205, the action was based upon the theory of a public duty and the action was by the addressee of the telegram. The Court in holding that he was bound by the terms of the contract made the following observations:

> "The underlying reason is, and must have been that in this class of cases, the duty, conferring the right of action *ex delicto* on one not a party to the contract, is necessarily colored by the contract out of which the duty arises. The duty, whether within the promise of the contract or imposed by law because of the public character and service of the company, must be the same, viz., that it will, with due diligence and skill, transmit and deliver the message as the sender and the company have stipulated. * * * He (the addressee) cannot establish a relation to the company through appeal to a contract and then repudiate, if to his advantage, provisions of the contract. He must accept and be bound by the whole contract or none of it."

The leading case on this question is now Gardner vs. Western Union Telegraph Company, 145 C. C. A. 399 (8th Circuit), 231 Fed. 405, where the action was brought by the addressee for delay in the delivery of an unrepeated telegram. The terms of the

contract were the same as those involved here, and the Court, at page 408, says:

> "Assuming for the present that the regulation was valid as between Scoville and the company, the question then presents itself as to whether it is binding on the plaintiff, notwithstanding the fact that this action is in tort and not on the contract.
>
> "There is not entire harmony among the authorities upon this question, but upon principle and sound reason we think the plaintiff is bound by the regulation in relation to the presentation of claims for damages. Let us analyze plaintiff's case. He says that the company was negligent in failing to deliver the message promptly. Negligence arises from a violation of duty owing by one person to another. If there is no duty, there is no negligence. Without the contract between Scoville and the company, the latter owed the plaintiff no duty, and hence there could be no negligence in the absence of the contract. So it plainly appears that plaintiff would have no cause of action except for the contract, because the duty of the company arose from the contract. May the plaintiff charge the company with the duty arising from the contract, and at the same time repudiate one of the conditions upon which the duty was assumed? We think not."

The following cases, all brought in tort by the sender of the telegram are cited in support of this

proposition and on examination they will all be found to sustain it:

Western U. Tel. Co. vs. Culberson, 79 Tex. 65, 19 S. W. 219.

Stone vs. Postal Tel. etc. Co. (R. I.), 76 Atl. 762, 29 L. R. A. (N. S.) 795.

Western U. Tel. Co. vs. Bank of Spencer, 53 Okla. 398, 156 Pac. 1175.

Bailey vs. Western U. Tel. Co., 97 Kan. 619, 156 Pac. 716.

Western U. Tel. Co. vs. Schade (Ky.), 192 S. W. 924.

Western U. Tel. Co. vs. Lee (Ky.), 192 S. W. 70.

Meadows vs. Postal Tel. etc. Co. (N. C.), 91 S. E. 1109.

Western U. Tel. Co. vs. Orr (Okla.), 158 Pac. 1139.

See to the same effect the more recent cases of:

Poor vs. Western U. Tel. Co., 196 Mo. App. 557, 196 S. W. 28.

Jacobs vs. Western U. Tel. Co., 196 Mo. App. 300, 196 S. W. 31.

Klotz vs. Western U. Tel. Co., 175 N. W. 825.

Postal Tel. Cable Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27, 64 L. Ed., where the Gardner case is expressly approved.

SINCE THE ACT OF JUNE 18, 1910, QUESTIONS RELATING TO INTERSTATE MESSAGES MUST BE DETERMINED BY THE FEDERAL LAW.

In this connection the cases decided since the Interstate Commerce Act was amended by the Act of Congress of June 18, 1910, show clearly that the question of how far the addressee of a telegram is bound by the terms of the contract under which it was sent and all questions concerning the reasonableness and effect of the provisions of this contract are matters of Federal and not State law, and that State constitutional and legislative provisions upon the subject must be disregarded by both State and Federal Courts. The statute in question amended the Interstate Commerce Act by providing that the provisions of the act should apply "to telegraph, telephone and cable companies engaged in sending messages from one state, territory or district of the United States to any other state, territory or district." It is also provided by said act that "messages by telegraph, telephone or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages."

The effect of these provisions has been conclusively determined by the Supreme Court of the United States in the recent cases of Postal Telegraph Cable Company vs. Warren-Godwin Lumber Company, 251

U. S. 27, 64 L. Ed....., decided December 18, 1919, and Western Union Telegraph Company vs. Boegli, 251 U. S. 315, 64 L. Ed....., decided January 12, 1920. In the former case the Court, speaking through Mr. Chief Justice White, said:

> "We come at once, therefore, to state briefly the reasons why we conclude that the Court below mistakenly limited the Act of Congress of 1910, and why, therefore, its judgment was erroneous.
>
> "In the first place, as it is apparent on the face of the Act of 1910 that it was intended to control telegraph companies by the Act to Regulate Commerce, we think it clear that the Act of 1910 was designed to and did subject such companies as to their interstate business to the rule of equality and uniformity of rates which it was manifestly the dominant purpose of the Act to Regulate Commerce to establish—a purpose which would be wholly destroyed if, as held by the Court below, the validity of contracts made by telegraph companies as to their interstate commerce business continued to be subjected to the control of divergent, and it may be, conflicting, local laws.
>
> "In the second place, as in terms the act empowered telegraph companies to establish reasonable rates, subject to the control which the Act to Regulate Commerce exerted, it follows that the power thus given, limited, of course, by such control, carried with it the primary

authority to provide a rate for unrepeated telegrams and the right to fix a reasonable limitation of responsibility where such rate was charged, since, as pointed out in the Primrose case, the right to contract on such subject was embraced within the grant of the primary rate-making power.

"In the third place, as the act expressly provided that the telegraph, telephone, or cable messages to which it related may be "classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable and different rates may be charged for the different classes of messages", it would seem unmistakably to draw under the Federal control the very power which the construction given below to the act necessarily excluded from such control. Indeed, the conclusive force of this view is made additionally cogent when it is considered that, as pointed out by the Interstate Commerce Commission (Cultra vs. Western U. Tel. Co., 44 Inters. Com. Rep. 670), from the very inception of the telegraph business, or at least for a period of forty years before 1910, the unrepeated message was one sent under a limited rate and subject to a limited responsibility of the character of the one here in contest.

"But we need pursue the subject no further, since, if not technically authoritatively controlled, it is in reason persuasively settled by

the decision of the Interstate Commerce Commission in dealing in the case above cited with the very question here under consideration as the result of the power conferred by the Act of Congress of 1910; by the careful opinion of the Circuit Court of Appeals of the eighth circuit, dealing with the same subject (Gardner vs. Western Union Teleg. Co., 145 C. C. A. 399, 231 Fed. 405); and by numerous and conclusive opinions of State Courts of last resort, which, in considering the Act of 1910 from various points of view, reached the conclusion that that act was an exertion by Congress of its authority to bring under Federal control the interstate business of telegraph companies, and therefore was an occupation of the field by Congress which excluded state action." (Citing numerous decisions.)

In the Boegli case the Court says:

"The proposition that the Act of 1910 must be narrowly construed so as to preserve the reserved power of the state over the subject in hand, although it is admitted that that power is in its nature Federal, and may be exercised by the state only because of non-action by Congress, is obviously too conflicting and unsound to require further notice. We, therefore, consider the statute in the light of its text, and, if there be ambiguity of its context, in order to give effect to the intent of Congress as manifested in its enactment.

"As the result of doing so, we are of opinion that the provisions of the statute bringing telegraph companies under the Act to Regulate Commerce, as well as placing them under the administrative control of the Interstate Commerce Commission, so clearly establish the purpose of Congress to subject such companies to a uniform national rule as to cause it to be certain that there was no room thereafter for the exercise by the several states of power to regulate, by penalizing the negligent failure to deliver promptly an interstate telegram, and that the Court below erred, therefore, in imposing the penalty fixed by the state statute."

See also Gardner vs. Western U. Tel. Co., 145 C. C. A. 399 (8th Circuit), 231 Fed. 405.

THE COURT WAS WITHOUT JURISDICTION TO DETERMINE THAT ANY OF THE PROVISIONS OF THE CONTRACT FOR THE TRANSMISSION OF THIS TELEGRAM WERE UNREASONABLE, AS THAT MUST BE DETERMINED BY THE INTERSTATE COMMISSION AND IT HAS HELD THESE REGULATIONS TO BE REASONABLE.

The record shows that the telegraph blank on which this message was written is on file with the Interstate Commerce Commission, as are the rules governing unrepeated messages, etc. (Tr. pp. 98-105, defendant's Exhibits B and C), hence, it must be presumed that they have the approval of the Com-

mission and as has frequently been held, if anyone is disssatisfied with these rates and regulations, relief must be sought before the Commission in the first instance. This was held in United States vs. M. & M. Traffic Association, 242 U. S. 178, 61 L. Ed. 233, 239, where the Court said:

> "To permit communities or shippers to seek redress for such grievances in the Courts would invade and often nullify the administrative authority vested in the Commission."

In Williams vs. Western Union Tel. Co., 203 Fed. 140, at page 145, the Court said:

> "Even if the plaintiff's case were based upon an alleged unreasonable regulation, which it is not on the pleadings, it is a question which cannot be entertained primarily in this Court. The question must be first raised before the Interstate Commerce Commission. Texas & Pacific Railway Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Baltimore & Ohio R. R. Co. vs. United States ex rel. Pitcairn Coal Co., 215 U. S. 481, 30 Sup. Ct. 164, 54 L. Ed. 292."

In Gardner vs. Western Union Tel. Co., 231 Fed. 405, an action by the receiver of a telegram as in this case, defendant relied upon one of the stipulations upon the message blank, which was expressly declared to be void by the Constitution of Oklahoma, where the action arose. The Circuit Court of Appeals, basing its opinion upon decisions of the Inter-

state Commerce Commission and various decisions of the Supreme Court, held the regulation to be valid and in the closing paragraph of this opinion said (p. 412):

> "We are, therefore, of the opinion that Congress, having taken possession of the field of interstate commerce by telegraph, the provision of the Constitution of Oklahoma relied upon has become inoperative for the purpose of striking down the regulation in question. Whether the regulation is a reasonable one or not is, in our judgment, a question for the Interstate Commerce Commission to determine. Mitchell Coal & Coke Co. vs. Pa. R. Co., 230 U. S. 247, 33 Sup. Ct. 916, 57 L. Ed. 1472; Tex. & Pac. Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Chicago & Alton Ry. Co. vs. Kirby, 225 U. S. 155, 32 Sup. Ct. 648, 56 L. Ed. 1033.

It is this case of Gardner vs. Western Union Telegraph Co. which is expressly approved by the Supreme Court and adopted as a part of the reasoning of the Court in Postal Tel. Co. vs. Warren-Godwin Lbr. Co., 251 U. S. 27.

An instructive case is:

> Western Union Tel. Co. vs. Bank of Spencer, 53 Okla. 398, 156 Pac. 1175.

Referring to the reasonableness of the stipulations of the telegraph company with regard to the transmission of messages, the Court says:

"The reasonableness of the regulations prescribed by the defendant is a question, the jurisdiction of which to determine is conferred by the Act of June 18, 1910, upon the Interstate Commerce Commission, and this Court has no jurisdiction in this action to declare said rules and regulations unreasonable, but this question must be raised before the Interstate Commerce Commission." (Citing numerous cases.)

This is one of the "numerous and conclusive opinions of State Courts of last resort" referred to by the Supreme Court of the United States in the case of Postal Telegraph Co. vs. Warren-Godwin Lumber Co., 251 U. S. 27.

To the same effect are:

Potlatch Lumber Co. vs. Spokane Ry. Co., 157 Fed. 288.

Great Northern R. R. Co. vs. Kalispell Lumber Co., 91 C. C. A. 63 (9th Circuit), 165 Fed. 25.

Erie R. R. Co. vs. Stone, 244 U. S. 332, 61 L. Ed. 1173.

The Interstate Commerce Commission in the case of Cultra vs. Western Union Telegraph Co., in an exhaustive opinion upheld the reasonableness of the provisions of the contract here involved and announced its conclusions in the following language:

"Our conclusion upon the record is that the Congress by the language used in the amendatory act of 1910, has manifested a definite in-

tention to place under the jurisdiction and control of this Commission the rates and practices of interstate telegraph companies as well as the rules, regulations, conditions and restrictions affecting their interstate rates; that the rate voluntarily used by the senders of the message in question was an unrepeated rate to wihch was lawfully attached as a fundamental feature of it the restricted liability insisted upon here by the defendant; that the Congress has expressly authorized such rates with a restricted liability attached; that such rates are not therefore contrary to public policy but on the contrary are binding upon all until lawfully changed; and that neither the interstate rates of the defendant nor the rules, practices, conditions and restrictions affecting these rates have been shown in this proceeding to be unreasonable or otherwise unlawful."

The Supreme Court of the United States in the Warren-Godwin Lumber Co. case, *supra*, followed the reasoning of the Commission in the above case and based its decision in part upon that of the Commission, and we submit that the conclusion thus reached by the Commission is binding upon the Court in collateral proceedings, such as the present, and must be taken as conclusively establishing the reasonableness and validity of the rules and regulations of the company and clauses of the contract in question, all of which are shown to be on file with the Commission.

THE CLAUSE REQUIRING WRITTEN NOTICE OF CLAIM WITHIN SIXTY DAYS FROM FILING THE TELEGRAM IS A COMPLETE DEFENSE.

As already pointed out, three different clauses of the contract of transmission are set up in the answer. The first is the clause requiring a claim in writing to be made within sixty days from the filing of the message. The learned District Judge denied plaintiff's right to any recovery on the ground that he had failed to make such claim, and if this clause is sustained in its application to the case at bar, the other clauses need not be considered. The second clause is the unrepeated message clause and this would allow plaintiff to recover the toll paid on the message, amounting to sixty-five cents, which the record shows was tendered to him and refused (Tr. pp. 66-67, Plaintiff's Exhibits 2 and 3). The third clause is the valuation clause which would limit the possible recovery to fifty dollars, in view of the fact that no greater value was placed upon the telegram when it was filed, and the rate of transmission was determined on the fifty dollar valuation.

The second separate defense in the answer pleads this clause, which is No. 6 in the contract of transmission and is as follows (Tr. p. 31): "The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the telegram is filed for transmission."

The validity of this clause was involved in the case

of Gardner vs. Western Union Tel. Co., 145 C. C. A. 399, 231 Fed. 405, where the Circuit Court of Appeals of the Eighth Circuit said at page 409:

> "We have disposed of the question under discussion on the theory that the 60-day clause was valid at common law as between Scoville and the company. We have no doubt of this. Southern Express Co. vs. Caldwell, 88 U. S. (21 Wall.) 264, 22 L. Ed. 556; M. K. & T. Ry. Co. vs. Harriman Brothers, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; Whitehill vs. Western Union Tel. Co. (C. C.), 136 Fed. 499; Manier vs. Western Union Tel. Co., 94 Tenn. 442, 29 S. W. 732."

The Court went on to hold that only the Interstate Commerce Commission could determine the regulation to be reasonable and directed judgment to be entered for the defendant telegraph company, because the notice was not given. This is the "careful opinion" referred to by the Supreme Court of the United States in the Warren-Godwin Lumber case, *supra*, as persuasively settling the question of the validity and effect of the regulations contained on the back of the telegraph blank.

In view of this approval, further quotation from the authorities seems unnecessary, but we have cited a number of cases sustaining this view in the Brief of the Argument, *supra*, and we do not think that, in view of these authorities, the intimation of the learned Trial Judge that the application of this pro-

vision under the circumstances of the case at bar would be unduly harsh, should be given the weight contended for it by counsel for plaintiff. Counsel for plaintiff argues that in view of the statement of the learned Trial Court quoted at page 19 of his brief, the clause is unreasonable and there is no provision in the contract for requiring plaintiff to make his written claim within sixty days from the discovery of the loss. In other words, plaintiff takes the position that because he did not know the telegram had been filed for transmission until more than sixty days after it was so filed, he is completely absolved from giving notice, and he further contends that the requirement was waived, but as we read the decision of the learned Trial Judge, he was extending the strict provision of the contract in plaintiff's favor and as he points out, there is authority for the proposition that a written notice under the circumstances given to the company within sixty days from discovery of the fact that the telegram was not delivered would have been in time. It therefore hardly seems fitting for plaintiff to argue that in making this ruling, which would have been favorable to him if he had not slept on his rights, the Court made a new contract for the parties. We have already shown that the Trial Court had no jurisdiction to determine the reasonableness of any of the provisions in the contract and if he considered the clause in question inapplicable because of plaintiff's lack of knowledge, he certainly was correct in holding that the written claim must

be made at least within sixty days of the discovery. In Postal Telegraph Co. vs. Nichols, 89 C. C. A. 585, 159 Fed. 43, this Court said:

> "It appears that the claim for damages was presented to the plaintiff in error on the 17th day of August, 1903. There was testimony on the part of the defendants in error to the effect that they did not know of the non-delivery of the telegram to Captain Richardson prior to July 11, 1903, which was much within the 60-day period."

In Western Union Tel. Co. vs. Lee, 174 Ky. 210, 192 S. W. 70, quoted at page 23 of plaintiff's brief, a similar holding was made by the Court, and we think these two decisions clearly imply that if the claim had not been made within sixty days from discovery, the provisions of the contract would have amounted to a bar.

The case of Larsen vs. Postal Telegraph Company, 150 Iowa 748, 130 N. W. 813, also cited by plaintiff, interpreted a special provision of the Iowa statute which would be invalid since the 1910 amendment to the Interstate Commerce Act and that case accordingly can have no application here. Plaintiff is accordingly forced to the argument that the provisions of this clause were waived by the company by reason of the fact that they had knowledge of the loss in February, 1918, more than sixty days after the telegram was filed, and that there was some talk of an adjustment. As argued in a previous

portion of this brief, we do not think this Court will consider the sufficiency of the evidence on the question of waiver because there are no special findings, but if the Court desires to go into the evidence we call attention to the testimony of Mr. Flora at pages 96 and 97 of the transcript, showing that the authority of the local manager was limited to adjustment of claims amounting to less than twenty-five dollars, or possibly at the time the message was sent to only ten dollars, and hence there could be no presumption of waiver by reason of the conversations with Mr. Hackett. The authorities cited by counsel for plaintiff on the question of waiver of this clause are all State Court decisions and with the possible exception of the case of Western Union Telegraph Company vs. Fitts, 79 S. E. 156, they all involved causes of action accruing before 1910. In the case last mentioned, it does not appear when the cause of action accrued, but there is no reference whatever to the Federal rule upon the question. The cases involving insurance policies are clearly not analogous and we do not think they require further mention.

Counsel also dismisses the Federal cases involving similar clauses in bills of lading with the assumption that they arose under a different statute and that therefore the Trial Court erred in citing some of these decisions as a basis for his opinion. The facts are, however, that the Carmack amendment of the Hepburn bill, 34 St. L. 595, was involved in all of these cases except, possibly, the case of Gooch vs. Oregon Short Line R. Co., 264 Fed. 664, recently

decided by this Court, and that the statute to which counsel undoubtedly refers is the so-called Cummins Act of March 4, 1915, which made special requirements in regard to notice of claim, etc., in bills of lading. The doctrine of the Federal Courts under both statutes has been that the clauses of the bills of lading could not be waived or varied by consent of the parties, because to do so would result in a variation from the rule of uniformity prescribed by the Interstate Commerce Act and would also result in discrimination in favor of cerain shippers contrary to such act. Since 1910, however, a telegraph company engaged in interstate business is subject to exactly the same rules requiring uniformity and absence of discrimination, as a carrier of goods, and we think a reference to the recent cases on the subject will show that the provision in question was not waived on the evidence, and apparently could not have been waived by the local agent at Boise talking with this plaintiff or his agent Jones, about the claim. This is especially true in view of the fact that the record shows that the amount claimed by plaintiff was never mentioned in any of these conversations, and in fact there was no way to determine it at that time. The record shows that the party desiring to purchase this bank stock was never financially able to buy it after December 4, 1917, and the assumption made several times in counsel's brief that the bank was already in process of liquidation in February, 1918, when plaintiff first learned that the telegram had been sent is not justified by the record and

is not true in fact. Plaintiff's own evidence shows that the liquidation occurred some time later when he was at the mine, although the precise date is not fixed.

In the recent case of Kerns vs. Western Union Telegraph Co. (Mo. App.), 198 S. W. 1132, the Court considered this question of waiver with some care and made the following observations:

> "The Federal decisions concerning the liability of common carriers of property in Interstate Commerce are to the effect that such provisions affecting liability cannot be waived, for to allow them to do so would be to afford an opportunity to make discriminations. It would seem that inasmuch as the Interstate Commerce Law as amended by the Act of June 18, 1910 (36 U. S. Stats. L. 544, C. 309) allows interstate telegraph companies to make classifications of service and charge reasonable rates for the different classifications, but requires that such rates shall be uniform for the same service and classification, it follows that responsibility for failure to properly perform such service should be uniform, and that such company would not be allowed to waive provisions in the contract affecting their liability any more than an interstate carrier of property would be allowed to do so."

The Court held in that case that mere knowledge by the company's local agent was insufficient to show a waiver.

In Georgia, Florida, etc. Co. vs. Blish Milling Company, 241 U. S. 190, 60 L. Ed. 948, the Supreme Court considered the question of waiver in the following language:

> "But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed."

In St. Louis etc. Co. vs. Starbird, 243 U. S. 592, 61 L. Ed. 917, the Court holds that notice to the dock master was not a compliance with a requirement of the bill of lading that claims of damage be reported to the delivering line within 36 hours. The Court points out that the case arose before the Act of March 4, 1915, hence it is clearly an authority here.

In Southern Pacific Ry. Co. vs. Stewart, 248 U. S. 446, 63 L. Ed. 350, the cause of action also arose before 1915 and the Supreme Court held that it was error to submit the question of waiver to the jury and that the Court should have granted the carrier's request for a directed verdict. In that case also it appeared that the local agent of the company knew of the loss immediately. In Gooch vs. Oregon Short

Line R. Co., 264 Fed. 664, this Court quotes the following from the Blish Milling case at page 666:

> "Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability, but to facilitate prompt investigation. And to this end it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it, even with respect to its own operations."

At page 667 this Court said:

> "It is true that in the present case the carrier had actual notice of the injury complained of, and through its agents sought, without success, a settlement of the damages occasioned thereby; but the offer of settlement was refused, and at no time, so far as appears, was the amount of his claim stated, even verbally, by the plaintiff in error, or by any representative of his."

We think the cases above cited are clearly applicable and that in order to prevent discrimination and to uphold the rule of uniformity prescribed by the Interstate Commerce Act, it is necessary that the rule applied to carriers of goods under the Act should also be applied to telegraph and cable companies.

THE UNREPEATED MESSAGE CLAUSE LIMITS THE RECOVERY TO THE AMOUNT PAID FOR SENDING THE MESSAGE.

As already pointed out, the sixty-day clause is a complete defense to the action and the Trial Court so treated it. But if for any reason this clause is held inapplicable, the unrepeated message clause pleaded in the second separate defense limits the recovery to the amount received by the company for sending the same. The validity of this clause so far as the Federal Courts are concerned is conclusively established by the cases of Primrose vs. Western Union Telegraph Company, 154 U. S. 1, 38 L. Ed. 883, and Postal Telegraph Cable Co. vs. Warren-Godwin Lumber Company, 251 U. S. 27, 64 L. Ed. ..... In the latter case the Court said:

> "In Primrose vs. Western U. Teleg. Co., 154 U. S. 1, 38 L. Ed. 883, 14 Sup. Ct. Rep. 1098, the Court passed upon the validity of a contract made by a telegraph company with the sender of a message by which, in case the message was missent, the liability of the company was limited to a refunding of the price paid for sending it, unless, as a means of guarding against mistake, the repeating of the message from the office to which it was directed to the office of origin was secured by the payment of an additional sum. It was held that such a contract was not one exempting the company from liability for its negligence, but was merely a reasonable condition appropriately adjusting the

charge for the service rendered to the duty and responsibility exacted for its performance. Such a contract was therefore decided to be valid, and the right to recover for error in transmitting a message which was sent subject to it was accordingly limited."

The Court then went on to show wherein the State Court had erred in not following the Primrose decision and held that case to be controlling and reversed the judgment. The exemption from liability for more than the amount paid for sending the telegram under this unrepeated clause has been upheld also in the following State Court cases, most of which are among those referred to in the opinion in the Warren-Godwin case as being conclusive upon the question:

Western U. Co. vs. Bank of Spencer, 53 Okla. 398, 156 Pac. 1165.

Bailey vs. Western U. Tel. Co., 97 Kan. 619, 156 Pac. 716, affirmed on rehearing, 99 Kan. 7, 160 Pac. 985.

Western U. Tel. Co. vs. Lee (Ky.), 192 S. W. 70.

Meadows vs. Postal Tel. Co. (N. C.), 192 S. E. 1009.

Haskell Implement Co. vs. Postal Tel. Co. (Me.), 96 Atl. 219.

Boyce vs. Western U. Tel. Co. (Va.), 89 S. E. 106.

Western U. Tel. Co. vs. Orr (Okla.), 158 Pac. 1139.

Western U. Tel. Co. vs. Kaufman (Okla.), 162 Pac. 708.

Notwithstanding these cases, plaintiff in error contended in the Trial Court, and argues here, that inasmuch as the telegram was never delivered a repetition of the message could have availed nothing and therefore this clause has no application. He bases his argument on certain observations in Postal Telegraph Company vs. Nichols, 89 C. C. A. 585, 159 Fed. 643; Box vs. Postal Telegraph Co., 91 C. C. A. 172, 165 Fed. 138, and Western Union Telegraph Co. vs. Lange, 160 C. C. A. 556, 248 Fed. 656.

The cause of action in all of these cases arose before the amendment of 1910 to which we have referred, and in all of them the sender of the telegram stated clearly the special circumstances because of which unusual promptness was required. The first case went entirely upon the doctrine of gross negligence, the company's agent having been advised within fifteen minutes after the telegram was started that the wires were down and it could not get through. In the Box case the agent of the company agreed to report delivery of the telegram and in the Lange case the agent of the company had received and accepted additional compensation upon which he had agreed to insure promptness. It should also be noted that in none of these cases was the valuation clause, contained in the contract in the

present case and pleaded in the last affirmative defense, a part of the contract. The Lange case was reversed on writ of certiorari by the Supreme Court of the United States under the title of Western Union Telegraph Company vs. Brown, Administrator, on grounds wholly independent of telegraph law. This decision was rendered May 17, 1920, and is to be found in the United States Supreme Court Advance Opinions published by the Lawyers Cooperative Company under date of June 15, 1920, at page 542. The Court stated that it was unnecessary to consider the correctness of the decision of this Court as to the oral contract of the agent or the question of negligence of the company in transmitting and delivering the message.

The Court in the Box case, *supra*, announced the doctrine that repeating messages would be of no avail where the cause of action arose from a delay in delivery or a failure to deliver, and in effect held that the unrepeated clause only applied to mistakes in transmission, notwithstanding the fact that the clause itself expressly states that the company will not be liable for mistakes or delays in the transmission or delivery or the non-delivery of an unrepeated telegram beyond the amount received for sending the same and the view announced in the Box case seems to have had some support in the decision of this Court in the Lange case, although the decision itself does not primarily rest upon that proposition. The unrepeated message clause, however, is more than a mere guarantee against mistakes in transmission

where the message is repeated. The unrepeated message is one sent at a lower rate without guarantees of correctness in transmission and with only a restricted liability, which restriction is expressly made to cover delays in transmission and delivery and non-delivery as well as mere mistakes in transmission.

A reference to the case of Cultra vs. Western Union Tel. Co., 44 Interstate Commerce Reports 670, illustrates this distinction. The Commission at page 675 said:

> "Almost from the beginning of telegraphy in this country the basic rate has been that charged for the transmission of an unrepeated message, the rates for repeated and special value messages being based upon it. The unrepeated rate or charge has always been made upon the condition, stated in the contract between the sender and the company, that no liability should attach to the company for errors in transmission or delays in delivery beyond the sum received for sending the message. The higher rate for repeated messages, concurrently maintained for many years with the unrepeated rate, is predicated in part upon the additional service performed, and in part upon the liability of the defendant to make good any damages incurred through error or delay in the transmission or delivery of the message to the extent of fifty times the rate charged, with a maximum of fifty dollars. For a long time also the de-

fendant has maintained still higher charges under which, upon payment of one-tenth of one per cent. of the amount of the assurance so desired, the defendant within the value so placed upon the message assumes liability to the full extent of the loss sustained. The fundamental difference between the unrepeated rate and the other two classes of rates is that under the former the sender assumes the risk of error or delay while under the latter the carrier assumes the risk in part or entirely, as the case may be; and the rules fixing the measure of the defendant's liability under these several classes of rates are essentially a part of the rates themselves."

The Commission then quotes from the decision of the Supreme Court of the United States in the leading case of Primrose vs. Western Union Telegraph Co., 154 U. S. 1, 38 L. Ed. 883, at page 893, where the Court said:

" 'The fallacy in that reasoning appears to us to be in the assumption that the company, under its admitted power to fix a reasonable rate establishes the usual rate as the compensation for the duty of transmitting any message whatever; whereas, what the company has done is to fix that rate for those messages only which are transmitted at the risk of the sender; and to require payment of the higher rate of half as much again if the company is to be liable

for mistakes or delays in the transmission or delivery or in the non-delivery of a message'."

As said by the Supreme Court of the United States in the passage quoted above from the Warren-Godwin Lumber Company case, the provision of the contract is merely a reasonable condition appropriately adjusting the charge for the service rendered to the duty and responsibility exacted for its performance.

In the recent case of Hartness vs. Western Union Telegraph Co. (S. C.), 99 S. E. 759, the weakness of the reasoning in the Box case is pointed out. The Court says:

> "It will thus be seen that His Honor, the presiding Judge, construed the provisions of the contract which limit the liability of the defendant as applicable only to those cases in which damages could have been prevented by a repetition of the message; and that the contract did not contain a limitation upon the liability of the defendant for damages, caused by its negligence in any other manner.
>
> "The ruling of His Honor, the Circuit Judge, was based upon the principles announced in the case of *Box vs. Postal Tel. Cable Co.*, reported in 165 Fed. 138, 91 C. C. A. 172, 28 L. R. A. (N. S.) 566."

Then after quoting from the decision in the Box case, the Court continues as follows:

> "The limitations of liability in the rules con-

strued in that case are very different from those now under consideration.

"In 1910 (which was after the decision in the Box case), Congress, in extending the provisions of the so-called Carmack amendment to telegraph and telephone companies, further amended Section 1 by incorporating in it a clause reading as follows:

" 'That messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages.' Act, June 18, 1910, c. 309, 36 Stat. 545 (U. S. Comp. St. 8563).

"The form of contract indorsed upon the telegram herein has been determined by the Interstate Commerce Commission to be reasonable and valid.

"In the case of Cultra vs. W. U. T. Co., 44 Interst. Com. Com'n R. 670, the Interstate Commerce Commission had under consideration the reasonableness of a form of contract which was in no particular materially different from the form upon which the message in this case was written.

"In determining the validity of such form of contract, the commission thus construed its provisions:

" 'If, as a matter of law, as the complaint contends, the rate charged and collected for an unrepeated message carries with it the same protection to the sender or recipient and imposes upon the telegraph company the same liability and degree of care as the rate for a repeated message, then the express authority by the Congress to maintain classification of repeated and unrepeated messages with the different rates attached thereto, is without significance or effect; for no useful purpose would have been served in authorizing the two classifications taking different rates without recognizing the fundamental difference between them that for years has been well understood and maintained. It seems clear, therefore, that the Congress in recognizing, by the amendment to the act above quoted, these three classes of messages with the different charges attached, has also recognized a distinction in the defendant's liability under them, and has sanctioned this distinction for the future, subject, of course, to the general provisions in the act requiring all rates, and all rules and regulations affecting rates, to be reasonable and uniform in their application, under like circumstances, for the different kinds of service offered. Such classification of its messages, with the different rates and liabilities attaching to them, having affirmative recognition in the act itself, it follows that when lawfuly fixed and offered to the public they are

> binding upon the defendant and upon all those who avail themselves of its services, until they have been lawfully changed. Abundant authority for this view is found in numerous decisions by the State and Federal Courts'."

The Court then holds that judgment should have been entered for the amount admitted to be due by defendant company.

An examination of the cases on this clause decided on causes of action arising after the Act of Congress of July 18, 1910, shows that the unrepeated clause has been held to restrict the liability of the telegraph company for delays in transmission or delivery or for failure to transmit or deliver as well as for mistakes in transmission, except in a few State Court cases overruled by the Supreme Court of the United States in the Warren-Godwin Lumber Company case already referred to.

In the Gardner case, which we have referred to frequently, the cause of action arose out of a delay in delivery.

In Bailey vs. Western U. Tel. Co., 97 Kan 619, 156 Pac. 716, the action was for delay in the transmission and delivery of an unrepeated telegram, and the answer pleaded both the unrepeated and the valuation clauses and also the sixty-day clause. The Supreme Court of Kansas held that a demurrer to this portion of the answer was properly overruled.

In Western U. Tel. Co. vs. Lee, 192 S. W. 70, the telegram was never delivered, but the Court held

that the unrepeated clause barred recovery for more than the amount of the tolls.

In Western U. Tel. Co. vs. Hawkins, 14 Ala. App. 295, 73 So. 973, the action was brought by the addressee of the telegram and was based on a failure to deliver. The unrepeated and valuation clauses were specifically pleaded. In upholding these defenses the Court said:

> "Nor can it be a matter of doubt that the stipulations with respect to the classification of defendant's messages, and the varying charges for their transmission and delivery according to the liability of defendant for failure therein, are, within the express terms of the amendment, to be dealt with, as to their reasonableness and validity, only by the Interstate Commerce Commission. This means that until such regulations and practices are condemned by the Commission they cannot be prohibited by state laws or pronounced invalid by the State Courts."

To the same effect are:

Western U. Tel. Co. vs. First Nat. Bank (Va.), 83 S. E. 424.

Western U. Tel. Co. vs. Orr (Okla.), 158 Pac. 1136.

Western U. Tel. Co. vs. Kaufman, 162 Pac. 708.

In all these cases the cause of action was based upon a delay in delivery or failure to deliver, and in

all of them the unrepeated message clause was upheld.

We submit, therefore, that these authorities show clearly that the Box, Lange and Nichols cases rest upon certain special facts and that they are not to be considered as binding authorities upon causes of action arising since the Interstate Commerce Act was amended in 1910.

Plaintiff in error argues, however, at some length that the facts show a case of gross negligence and that the unrepeated message clause is not a defense against such gross negligence. Here again it should be noted that the Trial Court made no special findings of fact and that as pointed out in an earlier portion of this brief, this Court will not under its established rule examine the evidence to determine whether or not the facts show gross negligence. It should also be borne in mind that the negligence sued upon was in the failure to transmit and deliver the telegram promptly and that the evidence regarding the inquiries concerning this telegram and the reports given in answer to such inquiries was offered and admitted solely for the purpose of showing that Jones was not negligent in not communicating further with the plaintiff (Tr. p. 87).

We, accordingly, do not think a case of gross negligence is shown by the record and if the record showed gross negligence, we are not contending that the unrepeated message clause would be applicable. The case in that event would fall under the valuation clause and the recovery would be limited to fifty

dollars instead of sixty-five cents, and we wish to call the Court's attention particularly to the fact that the cases cited by plaintiff in error at pages 43 to 55 of his brief, relate to the unrepeated message clause only and not to the valuation clause.

THE VALUATION CLAUSE LIMITS THE RECOVERY TO FIFTY DOLLARS, EVEN IN CASES OF GROSS NEGLIGENCE BY THE TELEGRAPH COMPANY.

Regardless of what view is taken of either the sixty-day clause or the unrepeated message clause, the valuation clause contained in Paragraph two of the contract of transmission (Tr. p. 30, p. 100), pleaded in the fourth affirmative defense, provided that "in any event the company shall not be liable for any mistakes or delays in the transmission or delivery, or for the non-delivery, of this telegram, *whether caused by the negligence of its servants or otherwise*, beyond the sum of fifty dollars, at which amount this telegram is hereby valued, unless a greater value is stated in writing hereon * * * and an additional sum paid or agreed to be paid based on such value equal to one-tenth of one per cent. thereof." No such valuation was placed on the telegram and no additional toll was paid or agreed to be paid, hence even if this Court should depart from its established rule, examine the evidence in this case and determine that gross negligence was found, plaintiff's recovery should nevertheless be limited to fifty dollars under this provision

of the contract. Plaintiff in error cannot be heard to argue that this regulation is unreasonable or the rate excessive, because as pointed out by the learned Trial Judge in his opinion in this case, if he makes such claims his remedy is before the Interstate Commerce Commission.

In the recent case of Klotz vs. Western Union Telegraph Company, 175 N. W. 825, the Supreme Court of Iowa upheld this provision, making the following statement in the course of its opinion:

> "In *Western Union Tel. Co. vs. Compton*, 114 Ark. 193, 169 S. W. 946, it was held that the sendee was equally bound with the sender to the stipulations in the contract. See, also, *Poor vs. Western Union Tel. Co.*, 196 Mo. App. 557, 196 S. W. 28, in which the sendee sued. He sustained actual loss of $712.50. The Court, however, held that the federal rule governed, and plaintiff was limited to the amount stipulated in the contract, and permitted him to recover but the $50 so stipulated.
>
> "We are not unmindful of the fact that State Courts, dealing with the subject-matter now under consideration, have reached different conclusions, but when the Supreme Court of the United States has spoken upon and given a construction to the acts of Congress the construction given controls the action of the State Courts. *When the Supreme Court says that the act of 1910 was intended to control telegraph companies, and when it says the act empowered*

telegraph companies to establish reasonable rates, subject to the control which the act to regulate commerce exerted, and when it says that the power thus given carries with it the authority to provide a rate and the right to fix a reasonable limitation of responsibility, bottomed on the rate, it follows that when the company proceeds upon that theory, fixes its rates and fixes the liability for negligence, bottomed on the rate, the liability fixed in the contract is the only liability to which the company can be subjected."

* * * * * * * * *

"A telegraph company has no way of knowing the value of a message, and has no way of knowing the extent of liability that may attach to a failure to transmit it at once. The sender is in a better position to know approximately the value of the thing sent and the damages that may flow from a failure to send it correctly. An agreement between the sender and the company as to the value of the message sent is tolerable when it serves as a basis both for charge and for liability. The charges are supposed to be commensurate with the risk assumed.

Other cases upholding the validity of this valuation clause expressly or by necessary implication are:

Western U. Tel. Co. vs. Compton, 114 Ark. 193, 169 S. W. 946.

Jacobs vs. Western U. Tel. Co., 196 Mo. App. 300, 196 S. W. 31.

Postal Tel. Co. vs. Warren-Godwin L. Co., 251 U. S. 27, 64 L. Ed.....

Western U. Tel. Co. vs. Kaufman (Okla.), 162 Pac. 708.

Cultra vs. Western U. Tel. Co., 44 Interstate Commerce Reports, page 670.

Western U. Tel. Co. vs. Schade, 192 S. W. 924.

Bailey vs. Western U. Tel. Co., 97 Kan. 619, 156 Pac. 716.

Kerns vs. Western U. Tel. Co., 198 S. W. 1132.

Hartness vs. Western U. Tel. Co., 99 S. E. 759.

Similar valuation clauses under the Interstate Commerce Act have become common in bills of lading issued by railroad and express companies and they have been uniformly upheld. Thus in Erie Railroad Co. vs. Stone, 244 U. S. 332, 61 L. Ed. 1173, at page 1175, the Court states:

> "In the case under consideration it appears that the reduced rates under which these horses were shipped and the limited liability arising from shipping under such reduced rates were fixed by the tariff schedules and the form of limited liability contract duly published and filed with the Interstate Commerce Commission, as required by law. These rates and that contract, which contained the notice requirement, thus became binding upon the parties until changed

by order of the Commission. This is too well settled to need discussion. The rules and regulations, duly published and filed, which in any wise affect the rates or the value of the service to be rendered, are controlling upon both parties to the shipping contract."

Numerous cases from the Supreme Court are cited in support of this rule and we call particular attention to the following cases from that Court:

Adams Express Co. vs. Croninger, 226 U. S. 491, 57 L. Ed. 314.

M. K. & T. Railway Co. vs. Harriman, 227 U. S. 657, 670, 57 L. Ed. 690.

C. C. C. & St. Louis Ry. Co. vs. Deitlebach, 239 U. S. 588, 60 L. Ed. 453.

Chicago, New Orleans, etc. Co. vs. Rankin, 241 U. S. 219, 60 L. Ed. 1022.

B. & M. R. R. Co. vs. Hooker, 233 U. S. 97, 58 L. Ed. 868.

Under these authorities the Trial Court very properly overruled defendant's objection to the introduction in evidence of the provisions of the telegraph blank as filed with the Commission and the approved rules and regulations of the company and very properly held that the provisions of the contract were binding on plaintiff in error as addressee of the telegram.

The wording of the valuation clause of the contract and the cases decided under it show clearly that even in case of gross negligence the liability of

the telegraph company is limited to the valuation placed upon it. There was nothing in this telegram to show whether plaintiff owned one or fifty shares of the bank stock, and as pointed out by the Trial Court, it was not an offer which could be turned into a contract by an acceptance from plaintiff. It was merely notice that a third party was willing to deal with plaintiff for his stock. It accordingly follows that if the sixty-day clause and the unrepeated message clause are disregarded for any reason, plaintiff's recovery is nevertheless limited to fifty dollars.

PLAINTIFF'S TESTIMONY AS TO WHAT HE WOULD HAVE DONE WAS INADMISSIBLE.

Assignment of error No. 2 challenges the ruling of the Court in refusing to admit plaintiff's testimony that if he had received the telegram he would have accepted the offer contained in the message. The question on this point is found at page 73 of the transcript and defendant's objection is stated at length on pages 73 and 74. It appears that the testimony was received subject to the objection and that thereafter the Court sustained the objection to the above testimony (Tr. p. 75).

It is evident from the wording of the telegram that no offer was made plaintiff which he could accept so as to make a binding contract, and his statement that he would have sold is mere conjecture based on a contingency that never happened, and the authorities show that such evidence is generally considered to be contrary to public policy as tending to

encourage corrupt testimony. In Western Union Telegraph Company vs. Hall, 124 U. S. 44, 31 L. Ed. 479, and on page 483, the Court said:

> "All that can be said to have been lost was the opportunity of buying on November ninth, and of making a profit by selling on the tenth, the sale on that day being purely contingent, without anything in the case to show that it was even probable or intended, much less that it would certainly have taken place."

In Western U. Tel. Co. vs. Ferguson (Ind.), 54 L. R. A. 846 and on 849, the Court states:

> "The plaintiff says he would have gone. But would he? The jury found so, as a fact, wholly from the plaintiff's present opinion on a past condition of things that never existed, but is now summoned before the mind by conjecture. Thus the mental anguish doctrine not only departs from principle in regard to measuring compensatory damages, but also warps the rules of evidence, which forbid a witness to testify what he would or would not have done in a stated contingency."

In Hall vs. Western U. Tel. Co., 51 So. 819, 27 L. R. A. (N. S.), 639 and on 642, it is stated:

> "The acceptance of the offer depended upon the independent will of the addressee and this contingency precludes recovery, even if the alleged loss of contemplated profits is susceptible of reasonably certain ascertainment."

Such testimony is at most the mere opinion of the witnesses and relates to damages which are too remote, speculative and contingent to be recoverable.

Bass. vs. Postal Tel. Co., 127 Ga. 423, 53 S. E. 465.

Wilson vs. Western U. Tel. Co., 124 Ga. 131, 52 S. E. 153.

Western U. Tel. Co. vs. Webb, 48 So. 408.

The mere loss of a possible opportunity to make an advantageous contract is insufficient as a showing of damage by reason of the failure to receive a telegram.

Richmond H. Mills vs. Western U. Tel. Co., 123 Ga. 216, 51 S. E. 290.

Western U. Tel. Co. vs. Watson, 94 Ga. 202, 21 S. E. 457.

Beatty Lumber Co. vs. Western U. Tel. Co., 52 W. Va. 410, 44 S. E. 309.

Kiley vs. Western U. Tel. Co., 39 Hun. 158. Affirmed in 109 N. Y. 231.

See additional cases cited *supra* under Brief of the Argument.

In the Richmond Mills case, *supra*, there was an offer to sell cotton yarn "delivery commencing in October". By an error in transmission the telegram read "delivery commencing in December". Testimony was offered to the effect that if the message had been transmitted correctly the offer would have been accepted and th Court, after quoting from the cases on the subject, said:

"So, in the present case, treating the contract as not completed, the contention is that an offer as received by the plaintiff was for December delivery, and that if it had been for October delivery it would have been accepted. There is little doubt that the plaintiff, or its vice-president, thinks now that it would have accepted the offer; but it is exceedingly speculative, as the basis for damages, to say that, if an offer had been received, the plaintiff would have accepted it, and would have derived certain advantages from it. While there is some evidence that the plaintiff placed an order at an advanced price, there is none as to how large an order was so placed, or how much the actual loss of the plaintiff was."

In the Beatty Lumber case, *supra*, the telegram quoted a price on a certain quantity of lumber, but the telegram was not delivered and the question was the sufficiency of the evidence to show that the proposals would have been accepted. The Court says:

"To repel the argument that the acceptance of the proposals to sell in this case was uncertain and contingent, we are told that Elias stated, as a witness, that his firm would have accepted that proposal if it had been received. *This will not prove the fact.* That evidence does not make the fact certain. The opinion of this witness months afterward cannot go to that length. In McCall vs. W. U. Tel. Co., cited, the

party to whom the telegram was addressed said that he would have accepted its proposal, but the Court said this did not change the nature of the matter. So, in Smith vs. W. U. Tel. Co., cited, the jury found that if the telegram had been received, the party would have sold his stock, but the Court said, 'What a person might or would have done in a certain event is not the proper subject of a special finding, and will not be considered'."

In the Watson case, *supra*, the suit was based upon a claim that had the message been properly transmitted, plaintiff would have sold certain cotton gins to Pitner and Pitner testified that he would have accepted the offer. The Court says:

"In order to do this it would have been necessary to obtain the consent of Pitner, and Pitner might or might not have made the new arrangement with Watson. It is true, Pitner says now that he would have made it, but we cannot tell whether he would have done so or not. He might have been in a different state of mind then from the state of mind he was in at the trial of the case. He might have consented to it or might not have done so. On the whole, we think the damages are too remote and uncertain to be the basis of a recovery."

In the Kiley case, the message was an offer to buy of Hilton & Waugh a quantity of oil. Hilton &

Waugh were at liberty to reject the offer had the message been received. The Court said:

> "But how can it be said with any degree of certainty that Hilton & Waugh would have accepted the plaintiff's offer to purchase of them the quantity of oil mentioned? They were under no legal obligation to accept his proposition. The claim of the plaintiff that they would have done so is wholly speculative."

The case at bar is stronger for the defendant than any of the cases above cited. The telegram, as pointed out, was not an offer in itself and plaintiff offered to prove by his own testimony that he would have sold the stock, but it appears from the evidence and as pointed out by the learned Trial Court this depended upon a number of contingencies. If plaintiff had received the telegram early Saturday morning, he says he would have sold the stock. The stock was collateral to a loan in the Security Bank of Oakland, according to his own testimony. If he had wished to sell the stock, would he have been able to secure it from the bank during banking hours on Saturday? If he had not secured the stock on that day, it could not have been obtained until after the bank opened on Monday, and it could not have reached Boise until December 6. At the close of business on the preceding day the Idaho National Bank carried an overdraft against the prospective purchaser of twenty-one thousand dollars and he never had enough money in the bank after that date

to pay for one-third of plaintiff's stock. Even if the stock had been secured and mailed to Idaho on December 1st, the day the telegram should have been delivered, there was still no binding contract for its purchase and there is no evidence in the record to show that David Miller would have accepted it or what is more to the point, that he would have paid plaintiff the cash price of forty-five hundred dollars asked for the stock. Under these circumstances and under the authorities above cited, we submit that the damages claimed are, as held by the Trial Court, too remote, speculative and contingent to be considered as a basis for recovery.

In this connection we note that plaintiff in error argues in his brief that this question is not within the pleadings because not raised as a special affirmative defense. But plaintiff alleged specifically in his complaint that Miller was ready and willing to buy the stock and plaintiff was ready and willing to sell the same, and that if the telegram had been delivered he would have sold the stock. (Paragraph VIII of the Complaint, Tr. p. 10.) In Paragraph VIII of the answer (Tr. pp. 17 and 18), it is specifically denied that Miller had the money or was ready or willing to buy the stock or that if the message had been received the plaintiff would have sold his stock to Miller or would have received therefor the sum of forty-five hundred dollars, or any other sum. Certainly these allegations and these denials must be held to raise an issue, and it was incumbent upon plaintiff to show by the strongest testimony

available that he could have obtained possession of the stock and forwarded it to Boise at a moment's notice. In face of these denials it cannot be said that plaintiff, who knew his stock was held as collateral security by the bank in Oakland, was taken by surprise and did not have an opportunity to call the bank officials and offer further inadmissible testimony as to what they would have done if plaintiff had asked to have his stock released some two years before.

We think the above argument demonstrates with sufficient clearness that the alleged bill of exceptions should be stricken from the transcript and that this Court should not in any event be required to examine into the sufficiency of the evidence to sustain the general finding in favor of defendant. We think further that in the event this Court takes the opposite view of these two questions, the provisions contained in the telegraph blank are binding upon the plaintiff and prevent his recovery and that the Trial Court properly excluded the evidence as to plaintiff's conjectural damages and properly held that no loss or damage had been shown.

Respectfully submitted,

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